United States Court of Appeals

for the Second Circuit

APPELLANT'S APPENDIX

76-7410

B

P/S

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Docket No. 76-7410

AMERICAN GREETINGS CORPORATION,
Appellant,

v.

WESTRANSCO FREIGHT COMPANY, INC.
and
ASSOCIATED FREIGHT LINES, INC.,
Appellees.

ON APPEAL FROM A JUDGMENT OF
THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

RECORD APPENDIX

Martin S. Snitow
Attorney for Appellant
277 Park Avenue
New York, New York 10017

OF COUNSEL:

Arsham & Keenan
277 Park Avenue
New York, New York 10017
(212) 759-1000

PAGINATION AS IN ORIGINAL COPY

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75 Civ. 5139 AMERICAN GREETINGS VS WESTRANSCO FREIGHT METZNER, J.

APPENDIX /

DATE	NR.	PROCEEDINGS
10-17-75	1	Filed complaint and issued summons.
10-24-75	2	Filed summons and Marshals return - served: Westransco Freight Co., Inc. by A. Maggione on 10-21-75
11-14-75	3	Filed stip. and order that defts time to answer is ext. to 12-01-75 -- Metzner, J.
11-25-75	4	Filed ANSWER TCB&L
11-25-75	5	Filed THIRD PARTY COMPLAINT - summons issued. TCB&L
12-04-75	6	Filed pltfs interrog.
12-04-75	7	Filed pltfs notice to produce.
12-09-75	8	Filed summons and Marshals return - served: Associated Freight Lines Inc. by R.D. Davis on 12-01-75
12-15-75	9	Filed stip. and order that the depositions of plaintiff's witnesses are adj. to 12-24-75 -- Metzner, J.
01-28-76	10	Filed ANSWER of 3rd pty deft. HRCL&O
01-29-76	11	Filed Third Party deft.'s interrogatories to the pltf.
02-13-76	12	Filed pltfs interrog.
03-24-76	13	Filed defts affdvt. and notice of motion for summary judgment - ret. 4-27-76
03-24-76	14	Filed defts Rule 9(g) statement
03-24-76	15	Filed deft's memorandum of law in support of its motion for summary judgment.
03-24-76	16	Filed deft's answers to interrogs.
03-24-76	17	Filed deft's answers to pltff's interrogs.
04-16-76	18	Filed pltf's notice of cross-motion and affdvt. for summary judgment ret. 4-27-76
04-16-76	19	Filed pltf's statement under Rule 9(g)
04-16-76	20	Filed pltf's memorandum of law.
04-23-76	21	Filed stip. and order adj. pending motions for summary judgment to 5-27-76. -- Metzner, J.
05-19-76	22	Filed deft's affdvt. and notice of motion to grant summary judgment Westransco Freight Co., Inc. against 3rd pty deft. Associated Freigh Lines, Inc. - ret. 5-27-76
05-19-76	23	Filed defts memorandum in support of motion #22.
05-19-76	24	Filed defts Rule 9(g) statement
05-20-76	25	Filed 3rd pty deft's answers to interrog. by pltf.
05-25-76	26	Filed deft's affdvt. in support of motion for summary judgment.
05-25-76	27	Filed deft's supplemental memorandum of law.
5-27-76	28	Filed Third Party deft's affidavit in oppostion to plaintiff's motion for summary judgment and in support of the defendat Westranco's motion for summary judgment dismissing pltfs complaint.
5-27-76	29	Filed pltfs affidavit in opposition submitted by Peter W. Flanagan, Esq., attorney for Third-party defendant.
06-25-76	--	Filed memo. end. on document # 22 The motion is withdrawn as moot-- Metzner, J. m/n
06-25-76	--	Filed memo. end. on document # 18 This motion is denied. See opinion filed on companion motion--Metzner, J. m/n
06-25-76	-30-	Filed OPINION # 44928 Deft. Westransco Freight Co., Inc. moves for summary judgment brought by pltf. American Greetings Corp. 3rd. pty deft.'s agent, Associate Freight Lines, Inc., 3rd-pty deft. Pltf. Cross-moves for summary judgment. Defts motion for summary judgment is granted. Pltfs motion for summary judgment is denied. Pltf. moves alternatively for leave to file an amended complaint. To allow the filing of the amended complaint under these circumstances would appear to be an exercise in futility. The motion to file an amended complai is denied--Metzner, J. m/n

BEST COPY AVAILABLE

75-Civ-139 American Greetings vs Westransco J. Metzner

110 Rev. Civil Docket Continuation

DATE	PROCEEDINGS
8-5-76	Filed notice of appeal to the USCA by Pltff. from the final judgment of J. Metzner dated 8-5-76 (mn)

A TRUE COPY
RAYMOND F. BURGHARDT, Clerk
By A. E. Thompson
Deputy Clerk

APPENDIX 2

75 CIV. 5139

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
----------X

AMERICAN GREETINGS CORPORATION,

Plaintiff,

v.

WESTRANSCO FREIGHT COMPANY, INC.

Defendant.
----------X

Civil Action No.

COMPLAINT

JUDGE METZNER

Plaintiff, AMERICAN GREETINGS CORPORATION, by its attorneys, ARSHAM & KEENAN, for its complaint alleges:

1. Plaintiff, AMERICAN GREETINGS CORPORATION ("American Greetings") is a corporation organized and existing under the laws of the State of Ohio.

2. Defendant, WESTRANSCO FREIGHT COMPANY, INC.,("Westransco") is a corporation organized and existing under the laws of the State of California and is authorized to do business in the State of New York. Westransco operates in interstate commerce as a freight forwarder. Upon information and belief, Westransco maintains offices at 393 Seventh Avenue, New York, N.Y. and 661 West 34th Street, New York, N.Y.

3. This action is brought under an act of Congress regulating commerce, to wit, §§20(11) and 413 of the Interstate Commerce Act,

APPENDIX 3

49 U.S.C. §§20(11) and 1013. Jurisdiction of this action is based upon 28 U.S.C. §1337.

4. The amount in controversy in this action exceeds the sum of $10,000.00 exclusive of interest and costs. Jurisdiction of this action is also based upon 28 U.S.C. §§1331 and 1332.

5. Venue of this action is placed in the Southern District of New York pursuant to 28 U.S.C. §1391(c).

6. On or about March 14, 1974 American Greetings tendered to Westransco three shipments of greeting cards and two shipments of Earthenware for transportation from Osceola, Arkansas to various U.S. Air Force installations located in California. None of these shipments, identified in the following schedule, was delivered.

Commodity	No. of Cartons	Destination	Westransco Claim No.	Value
Greeting cards	28	Mather A.F.B.	506005	$4,426.55
Earthenware	40	Mather A.F.B.	506006	1,260.00
Greeting cards	18	Travis A.F.B.	506007	2,733.70
Greeting cards	23	McClellan A.F.B.	506008	2,478.20
Earthenware	20	McClellan A.F.B.	506009	630.00

7. Upon information and belief, these five shipments were totally destroyed during transportation.

8. Upon information and belief, Westransco claims to have sent notice of the accident to the consignees and a copy of said notice to American Greetings by letters dated April 19, 1974.

APPENDIX 4

9. American Greetings was damaged in the amount of $11,528.45 by the failure of Westransco to deliver the shipments in good condition to the consignees.

10. All conditions precedent to the plaintiff's cause of action have been performed or have occurred.

WHEREFORE plaintiff, American Greetings Corporation, demands judgment against defendant, Westransco Freight Company, Inc., in the amount of $11,528.45 with interest, together with its costs and disbursements in this action, and such other and further relief as to the Court shall seem just.

ARSHAM & KEENAN
Attorneys for Plaintiff
277 Park Avenue
New York, N.Y. 10017
(212) PL 9-1000

By Martin S. Snitow
Martin S. Snitow

APPENDIX 5

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

---------- X

AMERICAN GREETINGS CORPORATION,

Plaintiff,

-against-

WESTRANSCO FREIGHT COMPANY, INC.,

Defendant.

---------- X

75 CIV. 5139

ANSWER

Judge Metzner

Defendant, WESTRANSCO FREIGHT COMPANY, sued here as WESTRANSCO FREIGHT COMPANY, INC., by its attorneys, TELL, CHESER, BREITBART & LEFKOWITZ, answering the complaint, alleges:

1. Denies any knowledge or information sufficient to form a belief as to the allegations contained in paragraph 1 of the complaint.

2. Denies the allegations contained in paragraph 2 of the complaint except that defendant admits that it is a corporation organized and existing under the laws of the State of Illinois and operates as a Part IV freight forwarder pursuant to the authority of the Interstate Commerce Commission and that it conducts business within the City and State of New York.

3. Denies the allegations contained in paragraph 6 of the complaint except that defendant admits that on or about March 14, 1974, defendant recei

APPENDIX 6

from plaintiff at Osceola, Arkansas, five shipments for transportation, condition and contents and value being unknown to defendant.

4. Denies the allegations contained in paragraphs 9 and 10 of the complaint.

AS AND FOR A FIRST AFFIRMATIVE DEFENSE, DEFENDANT ALLEGES:

5. That the shipments upon which this action is based were received by defendant for transportation in accordance with and subject to all the terms and conditions of the Uniform Bill of Lading prescribed by the Interstate Commerce Commission.

6. That among the terms and conditions of the Uniform Bill of Lading is the following provision:

> "As a condition precedent to recovery, claims must be filed in writing with the receiving or delivering carrier, or carrier issuing this bill of lading, or carrier on whose line the loss, damage, injury or delay occurred, within nine months after delivery of the property (or, in case of export traffic, within nine months after delivery at port of export) or, in case of failure to make delivery, then within nine months after a reasonable time for delivery has elapsed; and suits shall be instituted against any carrier only within two years and one day from the day when notice in writing is given by the carrier to the claimant that the carrier has disallowed the claim or any part or parts thereof specified in the notice. Where claims are not filed or suits are not instituted thereon in accordance with the foregoing provisions, no carrier hereunder shall be liable, and such claims will not be paid."

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7. That no claim was filed in writing by plaintiff on any of the shipments described in the complaint within the time limit stated in the foregoing provision, and by reason of such failure on the part of plaintiff, claims thereon are barred and this suit cannot be maintained.

AS AND FOR A SECOND AFFIRMATIVE DEFENSE, DEFENDANT ALLEGES:

8. That the shipments described in the complaint had no contacts with the State of New York, and for such reason this jurisdiction is a formum non-conveniens for the trial of this action and is improperly venued, and maintenance of this suit would constitute an unreasonable burden on interstate commerce in violation of Article I, § 8, Clause 3 of the Constitution of the United States.

WHEREFORE, defendant demands judgment dismissing the complaint, together with costs and disbursements.

TELL, CHESER, BREITBART &
LEFKOWITZ
Attorneys for Defendant
116 John Street
New York, N.Y. 10038
(212) 233-5100

By _____
A Member of the Firm

APPENDIX 8

AMERICAN GREETINGS CORPORATION

Plaintiff,

-against-

WESTRANSCO FREIGHT COMPANY,

Defendant and Third-Party Plaintiff,

-against-

ASSOCIATED FREIGHT LINES, INC.,

Third-Party Defendant.

----------X

75 CIV. 5139

THIRD-PARTY COMPLAINT

Defendant and third-party plaintiff, WESTRANSCO FREIGHT COMPANY, complaining of the third-party defendant, by TELL, CHESER, BREITBART & LEFKOWITZ, alleges:

1. That the third-party plaintiff, WESTRANSCO FREIGHT COMPANY, (hereinafter designated as "Westransco") was and still is a corporation organized and existing under and by virtue of the Laws of the State of Illinois, and is operating in interstate commerce as a freight forwarder pursuant to the authority of the Interstate Commerce Commission.

2. Upon information and belief, that at all the times hereinafter mentioned, the third-party defendant, ASSOCIATED FREIGHT LINES, INC. (hereinafter described as "Associated"), was and still is a corporation organized and existing under and by virtue of the Laws of the State of California.

3. Upon information and belief, that at all the times hereinafter mentioned, Associated was and still is a common carrier by motor.

APPENDIX 9

4. That on or about April 2, 1962, Associated entered into a contract with Pacific & Atlantic Shippers, Inc., which was duly filed with the Interstate Commerce Commission under No. FF-C1950; a copy of the said contract is hereto annexed as Exhibit A.

D specifically admits contract

5. That thereafter, Pacific & Atlantic Shippers, Inc., by appropriate corporate action, changed its name to WESTRANSCO FREIGHT COMPANY.

DK or I.

6. That Associated, by document, of which a copy is annexed as Exhibit 2, consented to the transfer of the contract referred to in paragraph 4 hereof to Westransco, and said document was duly filed with the Interstate Commerce Commission on or about March 4, 1968.

D specifically admits contract

7. That the said contract contained the following provision in paragraph 2 thereof:

> "2. Liability: Motor carrier shall assure and indemnify forwarder against liability arising by, in, or incident to the performance by motor carrier of any of the services provided for by this contract and for all shipments while in its possession, or because of any failure, delay or omission, of motor carrier, and shall assume prorata liability for unlocated loss or damage to shipments. Motor carrier shall maintain policies of insurance adequate to indemnify forwarder against liability as defined herein. Provided, however, That the liability of motor carrier shall in no way be limited by such policies of insurance."

D specifically admits contract

8. That on or about October 23, 1975, plaintiff instituted an action in this Court to recover the sum of $11,528.45, with interest, costs and disbursements, and a copy of the summons and complaint in the said action is annexed hereto as Exhibit C.

DK or I

APPENDIX 16

9. That the five shipments mentioned and described in paragraph 6 of the complaint were turned over and delivered by Westransco to Associated in

DK or I

good condition on or about April 18, 1974, for transportation and delivery to the destinations mentioned in the complaint.

10. That at the time the said five shipments were so turned over and delivered to Associated, the contract, of which copy is annexed as Exhibit A, was in full force and effect.

11. Upon information and belief, that the said five shipments were involved in an accident while in the custody of Associated and before delivery to the designated consignees, and were for all purposes deemed a total loss.

12. That if Westransco is held liable to plaintiff for any sum, that then and in such event Westransco will be entitled by reason of the provisions of the contract annexed to be fully indemnified by Associated for any sum Westransco may be required to pay.

WHEREFORE, defendant and third-party plaintiff, WESTRANSCO FREIGHT COMPANY, in the event it is liable to plaintiff, demands judgment over against the third-party defendant for all such sums, together with counsel fees, interest, disbursements and costs of this action.

TELL, CHESER, BREITBART &
LEFKOWITZ
Attorneys for Defendant &
Third-Party Plaintiff
116 John Street
New York, N.Y. 10038

By _____
A Member of the Firm

APPENDIX 11

NO. FP-C 1950
Effective MAY 23 1962
(Date)
Cancels

CONTRACT
BETWEEN
PACIFIC & ATLANTIC SHIPPERS, INC.
AND

ASSOCIATED FREIGHT LINES, 530 Brannan Street, San Francisco, California
(Name and address of Motor Carrier)

Pursuant to the terms of section 409(a) of the Interstate Commerce Act, as amended, PACIFIC & ATLANTIC, SHIPPERS, INC., hereafter called forwarder, and
ASSOCIATED FREIGHT LINES
(Name of Carrier)

hereafter called motor carrier, for and in consideration of the mutual covenants and payments hereinafter recited, hereby agree as follows:

Motor carrier will supply, and freight forwarder will utilize, as the needs and circumstances of its operation require, the services and instrumentalities of motor carrier specified herein and forwarder will pay the compensation specified therefor in the separate Schedule of Service and Compensation attached hereto and made a part hereof.

GENERAL TERMS AND CONDITIONS

1. Claims: Motor carrier will transmit to forwarder all claims or notices of claims for loss or damage or delay to shipments promptly after receipt thereof. Forwarder will promptly investigate, adjust, settle, compromise, pay, satisfy or defend all claims or demands.

2. Liability: Motor carrier shall assure and indemnify forwarder against liability arising by, in, or incident to the performance by motor carrier of any of the services provided for by this contract and for all shipments while in its possession, or because of any failure, delay or omission, of motor carrier, and shall assume prorata liability for unlocated loss or damage to shipments. Motor carrier shall maintain policies of insurance adequate to indemnify forwarder against liability as defined herein. Provided, however, That the liability of motor carrier shall in no way be limited by such policies of insurance.

3. Schedule of Service and Compensation: A separate schedule of service and compensation is attached hereto and made a part hereof, and the parties hereby agree that changes in said schedule hereinafter mutually agreed upon between the parties hereto may be filed with the Commission upon the certification of forwarder.

4. Description of Service: As used herein, the words "service" or "services" and "instrumentalities" shall be deemed to include (1) line haul transportation by motor carrier of a shipment or shipments moving in the service of forwarder (a) from point of origin or an interchange point to or toward a forwarder station and/or (b) from a forwarder station or an interchange point to or toward the ultimate destination and/or (c) between forwarder stations, as the circumstances require, and (2) all services incident thereto including, as forwarder may elect or require, pick-up, delivery, loading, and unloading of the freight, obtaining of shipping order, issuance of receipt or forwarder's bill of lading, collection and remittance of and receipt for prepaid charges, transmission of billing papers, obtaining delivery receipt, obtaining an original endorsed bill of lading, obtaining and remitting to forwarder cash, certified check or money order in payment of COD's, presentation of forwarder's freight bill, collection and remittance of forwarder's charges, and (3) the provision, maintenance and operation of all facilities, equipment and personnel incident to the performance of a complete transportation service in any one or all of the types of movements specified in item one of this paragraph.

5. Provision of Service and Instrumentalities: Motor carrier shall promptly, safely and expeditiously perform the service, and shall provide the instrumentalities, described herein, or so much thereof as may be necessary to effectuate transportation service specified in the separate Schedule of Service and Compensation attached hereto and made a part hereof.

It is understood that this contract shall not be construed as requiring or authorizing either party hereto to render service beyond the scope of its operating authority.

IN WITNESS WHEREOF, the parties hereto, by their duly authorized officers and agents have hereunto set their hands and seals this APR 2 1962 day of _____, 195__.

Attest (if a corporation):
(CORPORATE SEAL) Secretary

Attest (if a corporation):
(CORPORATE SEAL) Secretary

ASSOCIATED FREIGHT LINES
(Name of Motor Carrier)
Certificate No. MC- 57254
By M. L. Frost Jr.
(Name of Title of Officer)
M.L. Frost, Jr. Traffic Manager
PACIFIC & ATLANTIC SHIPPERS, INC.
By
(Name and Title of Officer)
Director of Transportation

APPENDIX 12

WESTRANSCO FREIGHT COMPANY
501 So. Anderson St.
Los Angeles, California 90033

FF-C No. 1950 *
*Pacific & Atlantic Shippers, Inc. Series
Date _____

To the Interstate Commerce Commission
Washington, D. C.

This is to certify that Associated Freight Lines hereby agrees to transfer to Westransco Freight Company all of the conditions, charges, rates, rules, regulations, etc., named in the above contract, including Schedules of Compensation and Supplements or Amendments thereto, filed with the Interstate Commerce Commission by Pacific & Atlantic Shippers, Inc. in every respect as if the same had been originally filed by Westransco Freight Company.

Associated Freight Lines
Name of Motor Carrier

Certificate No. MC 57254

Authorized Signature _____
Name and title of officer

APPENDIX 13

WESTRANSCO FREIGHT COMPANY
501 So. Anderson St.
Los Angeles, California 90033

Date March 4, 1968

FF-C No 1950 *
*Pacific & Atlantic Shippers, Inc., Series -

Interstate Commerce Commission
Bureau of Tariffs
Washington, D. C. 20423

Attached is original and copy of agreement between Westransco Freight Company and Associated Freight Lines

in connection with the above Contract originally filed by Pacific & Atlantic Shippers, Inc.

WESTRANSCO FREIGHT COMPANY

Ralph Fry
Executive Vice President

cc

Associated Freight Lines
1700 24th Street
Oakland, Calif. 94607

APPENDIX 14

10,924 PWF

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------x

AMERICAN GREETINGS CORPORATION, :

Plaintiff, :

- against - :

WESTRANSCO FREIGHT COMPANY, INC., :

Defendant. :

----------x

INDEX NO.
75 Civ. 5139
Judge Metzner

WESTRANSCO FREIGHT COMPANY, INC., :

Third-Party Plaintiff, :

- against - :

ASSOCIATED FREIGHT LINES, INC., :

Third-Party Defendant. :

----------x

ANSWER

The Third-Party Defendant, ASSOCIATED FREIGHT LINES, INC., (hereinafter Associated) through its attorneys HILL, RIVKINS, CAREY, LOESBERG & O'BRIEN, hereby appears in the action and for its answer to the Third-Party Complaint alleges upon information and belief as follows:

1.) Denies each and every allegation contained in paragraph numbered #12.

2.) Denies having knowledge or information sufficient to form a belief as to each and every allegation contained in paragraphs numbered #1, #5, #8, #9, #10 and #11.

3.) Denies each and every allegation contained in paragraphs numbered #4, #6 and #7 except that it admits the existance of each and every contract presently in effect between the Third-Party Plaintiff and the Third-Party Defendant and begs leave to refer to the original of such contracts at the time of trial of this action.

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FOR A FIRST AFFIRMATIVE AND COMPLETE DEFENSE TO EACH AND EVERY CAUSE OF ACTION THE THIRD-PARTY DEFENDANT ALLEGES:

4.) Whatever shipments were received for transportation by the carriers were accepted in accordance with, and subject to, all the terms and conditions of the Uniform Bill of Lading prescribed by the Interstate Commerce Commission and also subject to the effect classifications and tariffs, rules set forth therein, and the rules, regulations and practices of the Third-Party defendant and its connecting lines applicable thereto, including terminal tariffs, duly published and filed with said Commission which together form the Contract of Carriage between the parties for the transportation of said shipments and the responsibility of the carriers in the matter is defined by and subject to the provisions of the Interstate Commerce Act, the Bills of Lading Act and other Statutes of the United States of America applicable to the shipments moving in Interstate Commerce. The Third-Party defendant and its connecting carriers, if any, duly performed all of the terms and conditions on its and their part to be performed.

FOR A SECOND SEPARATE AND COMPLETE DEFENSE TO EACH AND EVERY CAUSE OF ACTION THE THIRD-PARTY DEFENDANT ALLEGES:

5.) The bill of lading agreement further provided in Section 2(b) as follows:

APPENDIX 16

" As a conditioned precedent to recovery, claims must be filed in writing with the receiving or delivering carrier, or carrier issuing this bill of lading, or carrier on whose line the loss, damage, injury or delay occurred, within nine months

> after delivery of the property (or, in the case of export tariff, within nine months after delivery at the port of export) or, in the case of failure to make delivery, then within nine months after a reasonable time for delivery has elapsed, and suit shall be instituted against any carrier only within two years and one day from the day when notice in writing is given by the carrier to the claimant that the carrier has disallowed the claim or any part or parts thereof specified in the notice. Where claims are not filed or suits are not instituted thereon in accordance with the foregoing provisions, no carrier hereunder shall be liable, and such claims will not be paid."

In the event that the claim was not filed nor suit instituted on any of the shipments that are the subject matter of the complaint herein within the time prescribed by such limits, suit on such shipments is barred.

FOR A THIRD SEPARATE AND PARTIAL DEFENSE TO EACH AND EVERY CAUSE OF ACTION THE THIRD-PARTY DEFENDANT ALLEGES:

6.) The bill of lading agreement provided in Section 2(a) as follows:

> "...[W]here a lower value than actual value has been represented in writing by the shipper or has been agreed upon in writing as the released value of the property as determined by the classification or tariffs upon which the rate is base, such lower value ... shall be the maximum amount to be recovered, whether or not such loss or damage occurs from negligence."

APPENDIX 17

In the event that said shipments [illegible]ved subject to any limitations of liability the plaintiff may not recover in excess of such limitation.

FOR A FOURTH SEPARATE AND COMPLETE DEFENSE TO EACH AND EVERY CAUSE OF ACTION THE THIRD-PARTY DEFENDANT ALLEGES:

7.) The shipments referred to in the complaint herein were loaded and counted by the shipper and/or his agent and the carrier is not responsible for any damage to such shipments caused by the improper loading thereof.

FOR A FIFTH SEPARATE AND COMPLETE DEFENSE TO EACH AND EVERY CAUSE OF ACTION THE THIRD-PARTY DEFENDANT ALLEGES:

8.) In the event that the plaintiff had not or has not any title or interest in the shipment that are the subject of this action then the plaintiff is not the real party in interest herein and is not entitled to maintain this suit

FOR A SIXTH SEPARATE AND COMPLETE DEFENSE TO EACH AND EVERY CAUSE OF ACTION THE THIRD-PARTY DEFENDANT ALLEGES:

9.) If the shipments referred to in the complaint suffered any loss or damage or delay, such loss damage or delay was caused by acts or omissions by a third party or parties over whom the carrier had no control.

FOR A SEVENTH SEPARATE AND PARTIAL DEFENSE TO EACH AND EVERY CAUSE OF ACTION THE DEFENDANT ALLEGES:

10.) The bill of lading, tariffs and classifications which constitute the contract of carriage do not contemplate

responsibility for special damages. If any percentage of the damages sought in the complaint herein are special damages then the third-party defendant is not responsible for such damages.

W H E R E F O R E , the third-party defendant, ASSOCIATED FREIGHT LINES, INC., demands judgment dismissing the complaint herein together with its costs and disbursements.

Dated: New York, New York

January 27, 1976

HILL, RIVKINS, CAREY, LOESBERG & O'BRIEN
Attorneys for Third-Party Defendants
ASSOCIATED FREIGHT LINES, INC.

By: Peter W Flanagan
Attorney of Record

96 Fulton Street
New York, New York 10038
Tele. No.: (212) 233-6171

To: TELL, CHESER, BREITBART & LEFKOWITZ
Attorneys for Deft./Third-Party Pltf.
116 John Street
New York, New York 10038

ARSHAM & KEENAN
ATTORNEYS For Plaintiff
277 Park Avenue
New York, New York 10017

APPENDIX 19

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

---------- X

AMERICAN GREETINGS CORPORATION,

Plaintiff,

-against-

WESTRANSCO FREIGHT COMPANY, INC.,

Defendant.

---------- X

WESTRANSCO FREIGHT COMPANY, INC.,

Third-Party Plaintiff,

-against-

ASSOCIATED FREIGHT LINES, INC.,

Third-Party Defendant.

---------- X

Index No. 75 Civ. 5139

Judge Metzner

DEFENDANT'S NOTICE OF MOTION FOR SUMMARY JUDGMENT IN FAVOR OF DEFENDANT AND AGAINST PLAINTIFF PURSUANT TO RULE 56 OF THE FEDERAL RULES OF CIVIL PROCEDURE

SIRS:

PLEASE TAKE NOTICE that upon the affidavit of DORA VILLA, sworn to the 18th day of March, 1976, and upon the copies of the pleadings and exhibits hereto annexed, the defendant will move before Honorable Charles M. Metzner, District Judge, in Room 2201, at the United States District Court for the Southern District of New York, Foley Square, Borough of Manhattan, City of New York, on the 27th day of April, 1976, at 10 o'clock in the forenoon of

APPENDIX 20

that day, pursuant to Rule 56 of the Federal Rules of Civil Procedure, granting summary judgment in favor of the defendant and against the plaintiff, and that summary judgment be entered in favor of the defendant on the ground that there is no genuine issue of fact, and that defendant is entitled to judgment as a matter of law, and for such other and further relief as may seem just and proper in the premises.

Dated: March 22, 1976

Yours, etc.

TELL, CHESER, BREITBART & LEFKOWITZ
Attorneys for Defendant
116 John Street
New York, N.Y. 10038

By _____
I.J. Kirschenbaum, Attorney of Record

TO:

ARSHAM & KEENAN, ESQS.
Attorneys for Plaintiff
277 Park Avenue
New York, N.Y. 10017

HILL, RIVKINS, CAREY, LOESBERG & O'BRIEN, ESQS.
Attorneys for Third-Party Defendant, Associated Freight Lines, Inc.
96 Fulton Street
New York, N.Y. 10038

APPENDIX 21

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

---------- X

AMERICAN GREETINGS CORPORATION,

Plaintiff,

-against-

WESTRANSCO FREIGHT COMPANY, INC.,

Defendant.

----------X

WESTRANSCO FREIGHT COMPANY, INC.,

Third-Party Plaintiff,

-against-

ASSOCIATED FREIGHT LINES, INC.,

Third-Party Defendant.

---------- X

AFFIDAVIT IN SUPPORT OF DEFENDANT'S MOTION FOR SUMMARY JUDGMENT PURSUANT TO RULE 56 OF THE FEDERAL RULES OF CIV PROCEDURE

STATE OF CALIFORNIA)
ss.:
COUNTY OF LOS ANGELES)

DORA VILLA, being duly sworn, deposes and says:

I am the claim agent of the defendant, WESTTRANSCO FREIGHT COMPANY (sued herein as WESTRANSCO FREIGHT CO., INC.), which maintains its executive office at 1041 Richmond Street, Los Angeles, California 90054.

APPENDIX 22

I am familiar with all the facts and circumstances herein, and I make this affidavit in support of defendant's motion under Rule 56 of the Federal Rules of Civil Procedure for summary judgment in favor of the defendant dismissing the complaint because of plaintiff's failure to timely file its claims in writing within the time allowed by § 2(b) of the Uniform Bill of Lading.

Hereto annexed and made a part hereof is a copy of the complaint in this action and of the answer interposed by the defendant.

There are also annexed copies of the third-party complaint and the answer pleaded by the third-party defendant, which I have been informed joins in this motion.

The facts in this case are not in dispute and a determination is sought that as a matter of law this action cannot be maintained.

The defendant is a freight forwarder operating in interstate commerce pursuant to the authority of the Interstate Commerce Commission. In connection with its duties as such freight forwarder, it uses various truckers and railroads to perform the transportation obligations it assumes to its customers who entrust shipments to it for delivery.

Plaintiff in this case maintains a factory at Osceola, Arkansas. For some six or seven years prior to 1974, it had used the defendant to trans-

port freight for it from Osceola, Arkansas, to various points in some of the western states.

In this case, plaintiff sues to recover a total of $11,528.45, claimed to be the value of five shipments which were picked up at plaintiff's plant in Osceola, Arkansas by defendant's pickup agent, Freightways Express, Inc., on March 14, 1974.

Hereto annexed and made a part hereof are copies of the five bills of lading issued to plaintiff at Osceola, Arkansas on March 14, 1974, when the shipments were picked up.

It will be noted that all of the shipments were intended for delivery to air force bases in California. Two of the shipments were to be delivered to Mather AFB, one to Travis AFB, and two to McClellan AFB.

All of the said shipments came to defendant's San Francisco terminal, where they were loaded on a truck belonging to the third-party defendant, ASSOCIATED FREIGHT LINES, INC., which was to make the deliveries on behalf of the defendant to the designated consignees.

I am advised that the five shipments were involved in an accident on March 27, 1974; that they were damaged beyond use and never delivered to the consignees.

APPENDX 24

At the time the shipments were made on March 14, 1974, § 2(b) of the Uniform Bill of Lading covering these shipments, read as follows:

> "As a condition precedent to recovery, claims must be filed in writing with the receiving or delivering carrier, or carrier issuing this bill of lading, or carrier on whose line the loss, damage, injury or delay occurred, within nine months after delivery of the property (or, in case of export traffic, within nine months after delivery at port of export) or, in case of failure to make delivery, then within nine months after a reasonable time for delivery has lapsed; and suits shall be instituted against any carrier only within two years and one day from the day when notice in writing is given by the carrier to the claimant that the carrier has disallowed the claim or any part or parts thereof specified in the notice. Where claims are not filed or suits are not instituted thereon in accordance with the foregoing provisions, no carrier hereunder shall be liable, and such claims will not be paid."

All of these shipments having been made on March 14, 1974, in order for plaintiff to prove compliance with the foregoing condition precedent, it would be necessary for plaintiff to show that a written notice of claim was filed with the defendant prior to December 14, 1974.

Hereto annexed and made a part hereof are the five letters received from the plaintiff, all dated May 30, 1975, asserting claim, and each had attached to it the claim form approved by the Interstate Commerce Commission, and these are also dated May 30, 1975. My file indicates that these letters and claim forms represented the first notice in writing of any presentation by plaintiff of claims arising out of the said five shipments.

I direct this Court's attention to the fact that in each of the claim forms, there is a statement to the effect that plaintiff was not notified of the loss until April, 1975. I have been advised by defendant's attorneys that the time when plaintiff may have learned of the non-deliveries is wholly immaterial to the obligation of plaintiff to comply with the aforementioned bill of lading provision.

I am now further advised that plaintiff was examined before trial in this case through James H. Edler, plaintiff's Corporate Director of Traffic, who signed the annexed claim letters and forms of claims dated May 30, 1975.

I have further been advised by defendant's attorneys that at the time of such examination before trial, Mr. Edler produced two letters, both dated January 23, 1975, addressed to defendant's pickup agent, Freightways Express, In making claim for the two shipments intended for Mather AFB.

I respectfully submit that regardless of what date is used by plaintiff, it is obvious that none of the claims was timely filed within the provisions of § 2(b) of the Uniform Bill of Lading. I therefore verily believe that this action is without merit, and I respectfully request that defendant's application for summary judgment dismissing the complaint should be granted.

Sworn to before me this 18th
day of March, 1976

Joann M. Hatfield

OFFICIAL SEAL
JOANN M. HATFIELD
Notary Public - California
LOS ANGELES COUNTY
My Commission Expires July 27, 1976

Dora Villa

APPENDIX 26

IS MEMORANDUM is an acknowledgement that a Bill of Lading has been issued and is not the Original Bill of Lading, nor a copy or duplicate, covering the property named herein, and is intended solely for filing or record.

CEIVED, subject to the classifications and tariffs in effect on the date of the receipt by the carrier of the property described in the Original Bill of Lading.

3-24-74

56825

DATE

SHIPPER'S NO. 3D 553393

FROM:

- [x] AMERICAN GREETINGS CORPORATION
- [ ] FORGET-ME-NOT CARDS
- [ ] LAUREL CARDS

AT OSCEOLA, ARKANSAS

CONSIGNED TO:

4735
California 95555

PLACE:

7 Wesh 25

NO. OF PKGS.		Kind of Package, Description of Articles, Special Marks and Exceptions	Weight (Subj. to Cor.)	Class or Rate	✓
		Prtd. Engr Litho Greeting Cards N.O.I., PSL	916		
		Wrapping Paper, Rolled, L/T 25 FT. PSL			
		Wrapping Paper, N.O.I.			
		Ribbon Rosettes			
		Ribbon, N.O.I. L/T 25 Continuous Yds.			
		Paper Napkins, Place Mats, Table Cloths, RSL			
		Store Display Racks, N.O.I., KD - OTF WIRE ☐ O'T WIRE ☐			
		Store Display Racks, N.O.I., KDF FIBD. ☐ O'T FIBD ☐			
		Store Display Racks, N.O.I., SU - OTF N.N WIRE ☐ O'T WIRE ☐			
		Paper Bags, N.O.I.			
		Dishes, Plates, Trays, N.O.I., Nested, Palpbd.			
		Cups, Drinking, Paper or Pulpbd, N.O.I. Nested.			
		Plastic Articles N.O.I. L/T 2 c.f. ☐ 2-3 c.f. ☐ 3-6 c.f. ☐ 6-12 c.f. ☐ 12-15 c.f. ☐ over 15 c.f. ☐			
		Candles N.O.I.			
		Confectionery or Consumer N.O.I. Pol. Value Not Exceeding $25.00 Per 100#			
		Articles Novelty N.O.I., PSL			
		POF 72791			
		TOTAL PACKAGES			

Subject to Section 7 of conditions of applicable bill of lading, if this shipment is to be delivered to the consignee without recourse on the consignor, the consignor shall sign the following statement:

The carrier shall not make delivery of this shipment without payment of freight and all other lawful charges.

Per _____
Signature of Consignor

If charges are to be prepaid write or stamp here, "To be Prepaid"

PREPAID

Rec'd $ _____ to apply in prepayment of the charges on the property described hereon.

Agent or Cashier

Per _____
The signature here acknowledges only the amount prepaid.

Charges advanced

$

† The term "carrier" as used in this shipment contains the special conditions set forth in the bill of lading, certificate thereon and all other requirements of the Uniform Freight Classification and/or of the National Motor Freight Classification.

‡ Shippers may not insert stamp name of bill of lading approved by the Interstate Commerce Commission.

INVOICE NO.

2011- 10500 11 4-0

COD

MAIL REMITTANCE TO

AMOUNT

CHARGE

TOTAL

AGENT

ARK. TRAV., INC

PER

If the shipment moves between two ports by a carrier by water, the law requires that the bill of lading shall state whether it is "carrier's or shipper's weight."

NOTE — Where the rate is dependent on value, shippers are required to state specifically in writing the agreed or declared value of the property.

The agreed or declared value of the property is hereby specifically stated by the shipper to be not exceeding _____

AMERICAN GREETINGS CORP.
10500 AMERICAN ROAD
CLEVELAND, OHIO 44144
(PERMANENT POST OFFICE ADDRESS)

APPENDIX 27

THIS MEMORANDUM is an acknowledgement that a Bill of Lading has been issued and is not the Original Bill of Lading, nor a copy or duplicate, covering the property named herein, and is intended solely for filing or record.

RECEIVED, subject to the classifications and tariffs in effect on the date of the receipt by the carrier of the property described in the Original Bill of Lading.

3/14/74

56817

DATE

SHIPPER'S NO. 3D 583330

CONSIGNED TO:

[illegible] AFB 4795

[illegible] 3551

[illegible] AFB California 95655

CARRIER:

[illegible] Watts 25

FROM:

- [x] AMERICAN GREETINGS CORPORATION
- [ ] FORGET-ME-NOT CARDS
- [ ] LAUREL CARDS

AT OSCEOLA, ARKANSAS

NO. OF PKGS. CTNS.	PCKS.	Kind of Package, Description of Articles, Special Marks and Exceptions	* Weight (Sub. to Cor.)	Class or Rate	✓
		Prod. Engr Litho Greeting Cards N.O.I., RSL			
		Wrapping Paper, Rolled, L/T 25 FT. RSL			
		Wrapping Paper, N.O.I.			
		Ribbon Rosettes			
		Ribbon, N.O.I. L/T 25 Continuous Yds.			
		Paper Napkins, Place Mats, Table Cloths, RSL			
		Store Display Racks, N.O.I., KD - OTF WIRE [ ] O'T WIRE [ ]			
		Store Display Racks, N.O.I., KDF FIBD. [ ] O'T FIBD. [ ]			
		Store Display Racks, N.O.I., SU - OTF N'N WIRE [ ] O'T WIRE [ ]			
		Paper Bags, N.O.I.			
		Dishes, Plates, Trays, N.O.I., Nested, Pulpbd.			
		Cups, Drinking, Paper or Pulpbd, N.O.I. Nested.			
		Plastic Articles N.O.I. L/T 2 c.f. [ ] 2-3 c.f. [ ] 3-6 c.f. [ ]			
		6-12 c.f. [ ] 12-15 c.f. [ ] over 15 c.f. [ ]			
		Candles N.O.I.			
		Estimated Freight Charges N.O.I. Bal. Value Not Exceeding $2.00 Per Lbs	1230		
		Ass. Merchandise N.O.I., PW.			
		NO- 237172			
		TOTAL PACKAGES			

Subject to Section 7 of conditions of applicable bill of lading, if this shipment is to be delivered to the consignee without recourse on the consignor, the consignor shall sign the following statement.

The carrier shall not make delivery of this shipment without payment of freight and all other lawful charges.

Per _____ (Signature of Consignor)

If charges are to be prepaid, write or stamp here, "To be Prepaid."

PREPAID

Rec'd $ _____ to apply in prepayment of the charges on the property described hereon.

Agent or Cashier

Per _____

The signature here acknowledges only the amount prepaid.

Charges advanced

$

*The fibre containers used for this shipment conform to the specifications set forth in the box maker's certificate thereon and all other requirements of the Uniform Freight Classification and Rules of the National Motor Freight Classification.

*Shipper's marks or numbers of stamp not a part of bill of lading approved by the Interstate Commerce Commission.

PROCE NO

* If rate is based on weight, the law requires that the bill of lading shall show whether it is carrier's or shipper's weight.

NOTE—Where the rate is dependent on value, shippers are required to state specifically in writing the agreed or declared value of the property.

The agreed or declared value of the property is hereby specifically stated by the shipper to be not exceeding _____ per _____

AMERICAN GREETINGS CORP.
10500 AMERICAN ROAD
CLEVELAND, OHIO 44144
(PERMANENT POST OFFICE ADDRESS)

PER [illegible]

COD

MAIL REMITTANCE TO

AMOUNT

CHARGE

TOTAL

AGENT ARK. TRAV., INC.

PER

BEST COPY AVAILABLE

APPENDIX 28

THIS MEMORANDUM is an acknowledgment that a Bill of Lading has been issued and is not the Original Bill of Lading, nor a copy or duplicate, covering the property named herein, and is intended solely for filing or record.

RECEIVED, subject to the classifications and tariffs in effect on the date of the receipt by the carrier of the property described in the Original Bill of Lading.

SHIPPER'S NO. 3D 532932

56809

CONSIGNED TO:

Travis AFB 4792
Jr 1005 Bldg 650
Travis AFB California 94535

CARRIER:
Attn: General mgr

DATE

FROM:

- [x] AMERICAN GREETINGS CORPORATION
- [ ] FORGET-ME-NOT CARDS
- [ ] LAUREL CARDS

AT OSCEOLA, ARKANSAS

NO. OF PKGS. CTNS.	BDLS.	Kind of Package, Description of Articles, Special Marks and Exceptions	* Weight (Sub. to Cor.)	Class or Rate	✓
11		Prnd. Engr Litho Greeting Cards N.O.I., RSL	615		
		Wrapping Paper, Rolled, L/T 25 FT. RSL			
		Wrapping Paper, N.O.I.			
		Ribbon Passerts			
		Ribbon, N.O.I. L/T 2s Commons Yds.			
		Paper Napkins, Place Mats, Table Cloths, RSL			
		Store Display Racks, N.O.I., 4D - OTF WIRE [ ] O'T WIRE [ ]			
		Store Display Racks, N.O.I., 4DF FIBD. [ ] O'T FIBD. [ ]			
		Store Display Racks, N.O.I., 2D - OTF WIRE [ ] O'T WIRE [ ]			
		Paper Bags, N.O.I.			
		Dishes, Plates, Trays, N.O.I., Nested, Pulpbd.			
		Cups, Drinking, Paper or Pulpbd, N.O.I. Nested.			
		Plastic Articles N.O.I. L/T 2 c.f. [ ] 2-6 c.f. [ ] 6-6 c.f. [ ]			
		6-12 c.f. [ ] 12-15 c.f. [ ] over 15 c.f. [ ]			
		Candles N.O.I.			
		Commodities not otherwise N.O.I. Rel. V1 - Not Exceeding $50.00 Per 100#			
		Artificial Materials N.O.I., Pv. 22- 72701			
		TOTAL PACKAGES			

Subject to Section 7 of conditions of applicable bill of lading, if this shipment is to be delivered to the consignee without recourse on the consignor, the consignor shall sign the following statement.

The carrier shall not make delivery of this shipment without payment of freight and all other lawful charges.

Per _____
(Signature of Consignor)

If charges are to be prepaid, write or stamp here, "To Be Prepaid."

PREPAID

Rec'd $ _____
to apply in prepayment of the charges on the property described hereon.

Agent or Cashier

Per _____
The signature here acknowledges only the amount prepaid.

Charges advanced
$

*The fibre containers used for this shipment conform to the specifications set forth in the box maker's certificate thereon and all other requirements of the Uniform Freight Classification and Rule 5 of the National Motor Freight Classification.

*Shipper's marks, or lack of stamp, not a part of bill of lading approved by the Interstate Commerce Commission.

INVOICE NO.

[illegible] 11 4,1

* If the shipment moves between two ports by a carrier by water, the law requires that the bill of lading shall state whether it is "carrier's or shipper's weight."

NOTE – Where the rate is dependent on value, shippers are required to state specifically in writing the agreed or declared value of the property.

The agreed or declared value of the property is hereby specifically stated by the shipper to be not exceeding _____

AMERICAN GREETINGS CORP.
10500 AMERICAN ROAD
CLEVELAND, OHIO 44144
(PERMANENT POST OFFICE ADDRESS)

COD
TO MAIL REMITTANCE TO

AMOUNT

CHARGE

TOTAL

ARK PENT RAV. INC.

PER

APPENDIX 29

THIS MEMORANDUM is an acknowledgement that a Bill of Lading has been issued and is not the Original Bill of Lading, nor a copy or duplicate, covering the property named herein, and is intended solely for filing or record.

RECEIVED, subject to the classifications and tariffs in effect on the date of the receipt by the carrier of the property described in the Original Bill of Lading.

SHIPPER'S NO. 3D593326

CONSIGNED TO:

Mcclellan AFB
Dept. F Bldg 1407
Mcclellan California 95652

3/24/74 56810

DATE

FROM:

- [x] AMERICAN GREETINGS CORPORATION
- [ ] FORGET-ME-NOT CARDS
- [ ] LAUREL CARDS

AT OSCEOLA, ARKANSAS

CARRIER:

ABI 25

NO. OF PKGS. CTNS.	BDLS.	Kind of Package, Description of Articles, Special Marks and Exceptions	* Weight (Sub. to Cor.)	Class or Rate	✓
22		Prtd. Engr Litho Greeting Cards N.O.I., RSL	517		
		Wrapping Paper, Rolled, L/T 25 FT. RSL			
		Wrapping Paper, N.O.I.			
		Ribbon Rosettes			
		Ribbon, N.O.I. L/T 25 Continuous Yds.			
		Paper Napkins, Place Mats, Table Cloths, RSL			
		Store Display Racks, N.O.I., KD - OTF WIRE [ ] O'T WIRE [ ]			
		Store Display Racks, N.O.I., KDF FIBD. [ ] O'T FIBD. [ ]			
		Store Display Racks, N.O.I., SU - OTF N'N WIRE [ ] O'T WIRE [ ]			
		Paper Bags, N.O.I.			
		Dishes, Plates, Trays, N.O.I., Nested, Pulpbd.			
		Cups, Drinking, Paper or Pulpbd, N.O.I. Nested.			
		Plastic Articles N.O.I. L/T 2 c.f. [ ] 2-3 c.f. [ ] 3-6 c.f. [ ] 6-12 c.f. [ ] 12-15 c.f. [ ] over 15 c.f. [ ]			
		Candles N.O.I.			
		Earthenware or Chinaware N.O.I. Del. Value Not Exceeding $25.00 Per Pkg.			
		Articles N.O.I. NOI			
		22-72737			
		TOTAL PACKAGES			

Subject to Section 7 of conditions of applicable bill of lading, if this shipment is to be delivered to the consignee without recourse on the consignor, the consignor shall sign the following statement.

The carrier shall not make delivery of this shipment without payment of freight and all other lawful charges.

Per _____
(Signature of Consignee)

If charges are to be prepaid, write or stamp here, "To be Prepaid."

PREPAID

Rec'd $ _____ to apply in prepayment of the charges on the property described hereon.

Agent or Cashier

Per _____
The signature here acknowledges only the amount prepaid.

Charges advanced
$

† The tariffs contained in this shipment contain in the specifications set forth in the bill of lading's certificate thereon and all other requirements of the Uniform Freight Classification and Rules of the National Motor Freight Classification.

†Shipper's marks, or stamp not a part of bill of lading approved by the Interstate Commerce Commission.

PROS NO 2[illegible]-7[illegible]3 11 4/1

* When shipment moves between two ports by water or by water, the law requires that the bill of lading shall state whether it is "carrier's or shipper's weight."

NOTE — Where the rate is dependent on value, shippers are required to state specifically in writing the agreed or declared value of the property.

The agreed or declared value of the property is hereby specifically stated by the shipper to be not exceeding _____ per _____

AMERICAN GREETINGS CORP.
10500 AMERICAN ROAD
CLEVELAND, OHIO 44144
(PERMANENT POST OFFICE ADDRESS)

PER

COD
MAIL REMITTANCE TO
AMOUNT
CHARGE
TOTAL

ARK AGENCY, INC.

PER

APPENDIX 30

THIS MEMORANDUM is an acknowledgement that a Bill of Lading has been issued and is not the Original Bill of Lading, nor a copy or duplicate, covering the property named herein, and is intended solely for filing or record.

RECEIVED, subject to the classifications and tariffs in effect on the date of the receipt by the carrier of the property described in the Original Bill of Lading.

SHIPPER'S NO. 5682 3 D 593389

CONSIGNED TO:

McClellan AFB
Dept 2 Bldg 1407
McClellan California 95652

3-14-71

DATE

FROM:

- [x] AMERICAN GREETINGS CORPORATION
- [ ] FORGET-ME-NOT CARDS
- [ ] LAUREL CARDS

AT OSCEOLA, ARKANSAS

CARRIER:

ST 2 Westb 25

NO. OF PKGS. CTNS.	NO. OF PKGS. BDLS.	Kind of Package, Description of Articles, Special Marks and Exceptions	* Weight (Sub. to Corr.)	Class or Rate	✓
		Card, Engr Litho Greeting Cards N.O.I., RSL			
		Wrapping Paper, Rolled, L/T 25 FT. RSL			
		Wrapping Paper, N.O.I.			
		Ribbon Passetes			
		Ribbon, N.O.I. L/T 25 Continuous Yds.			
		Paper Napkins, Place Mats, Table Cloths, RSL			
		Store Display Racks, N.O.I., KD - OTF WIRE [ ] O'T WIRE [ ]			
		Store Display Racks, N.O.I., KDF FIBD. [ ] O'T FIBD. [ ]			
		Store Display Racks, N.O.I., SU - OTF N'N WIRE [ ] O'T WIRE [ ]			
		Paper Bags, N.O.I.			
		Dishes, Plates, Trays, N.O.I., Nested, Pulpbd.			
		Cups, Drinking, Paper or Pulpbd, N.O.I., Nested.			
		Plastic Articles N.O.I. L/T 2 c.f. [ ] 2-4 c.f. [ ] 4-6 c.f. [ ]			
		6-12 c.f. [ ] 12-15 c.f. [ ] over 15 c.f. [ ]			
		Candles N.O.I.			
10		Confectionery or Chinaware N.O.I. Ref. Value Not Exceeding $25.00 Per Item	640		
		PO# 237173			
		Amusement N.O.I., RSL			
		TOTAL PACKAGES			

Subject to Section 7 of conditions of applicable bill of lading, if this shipment is to be delivered to the consignee without recourse on the consignor, the consignor shall sign the following statement.

The carrier shall not make delivery of this shipment without payment of freight and all other lawful charges.

Per _____
Signature of Consignor

If charges are to be prepaid write or stamp here, "To be Prepaid."

PREPAID

Rec'd $ _____ to apply in prepayment of the charges on the property described hereon.

Agent or Cashier

Per _____
The signature here acknowledges only the amount prepaid.

Charges advanced

$

* The fibre containers used for this shipment conform to the specifications set forth in the box maker's certificate thereon, and to other requirements of the Uniform Freight Classification and Rules of the National Motor Freight Classification.

*Shipper's imprint in lieu of stamp, not a part of bill of lading approved by the Interstate Commerce Commission.

INVOICE NO.

3070-72000 11 4-01

* If the shipment moves between two ports by a carrier by water, the law requires that the bill of lading shall state whether it is "carrier's or shipper's weight."

NOTE—Where the rate is dependent on value, shippers are required to state specifically in writing the agreed or declared value of the property.

The agreed or declared value of the property is hereby specifically stated by the shipper to be not exceeding _____ per _____

AMERICAN GREETINGS CORP.
10500 AMERICAN ROAD
CLEVELAND, OHIO 44144
(PERMANENT POST OFFICE ADDRESS)

COD
MAIL REMITTANCE TO

AMOUNT

CHARGE

TOTAL

AGENT
ARK. TRAV. INC

PER

APPENDIX 31

E06005

American Greetings Corporation

Westransco
P.O. Box 54810
Los Angeles, Calif. 90054

May 30, 1975
Claim # 2018-79500

Attn: Claim Agent

Gentlemen:

The attached claim papers are in support of our claim 2018-79500 filed in the amount of $4426.55 to cover loss of a shipment we made on 3/14/74 to Mathers AFB, Bldg. 3636 Mather AFB, Calif.

Please acknowledge receipt of the attached claim papers and allow us your check to cover.

Yours with "American Greetings"

James H. Edler

James H. Edler
Corporate Director of Traffic

JHE/kr

APPENDIX 32

STANDARD FORM FOR PRESENTATION OF LOSS AND DAMAGE CLAIM

Approved by the Interstate Commerce Commission, the National Industrial Traffic League, the Freight Claim Association

Westransco Cleveland, Ohio Claimant's No. 2018-79500

P.O. Box 54810 Date 5/30/75 Carrier's No.

Los Angeles, Calif. 90054

506005

This claim for $ 4426.55 is made against the carrier named above

By American Greetings Corp. for loss in connection with the following described shipment:

Description of shipment 23 cartons Mothers Day cards 916#

Name and address of consignor (Shipper) American Greetings Corp., RFD #1, Osceola, Ark.

Shipped From Osceola, Arkansas To 183368

Final Destination Routed Via

B. L. issued by American Greetings Corp. B. L. Date 593393 3/14/74

Pd. Freight Bill (Pro) No. 361412-022 3/22/74 Original Car No.

Name and address of Consignee Mathers AFB, Bldg 3636, Mather AFB, Calif. 95655

DETAILED STATEMENT SHOWING HOW AMOUNT CLAIMED IS DETERMINED

See invoice attached	$4426.55
Total Amount Claimed	$4426.55

IN ADDITION TO INFORMATION GIVEN ABOVE, THE FOLLOWING DOCUMENTS ARE SUBMITTED IN SUPPORT OF THIS CLAIM.

(*) 1. Original paid freight ("Expense") bill
( ) 2. Original invoice or certified copy
( ) 3. Original B. L. if not previously surrendered to carrier.
( ) 4. Other particulars obtainable in proof of loss or damage claimed:

Remarks: *Bond of Indemnity in lieu of original paid freight bill.

This shipment was involved in an accident and was considered a total loss. American Greetings was not notified until April, 1975.

The foregoing statement of facts is true, and the amount claimed is correct.

APPENDIX 33

American Greetings Corp.

American Greetings Corporation 10500 AMERICAN ROAD · CLEVELAND OHIO 44144

Westransco
P.O. Box 54810
Los Angeles, Calif. 90054

May 30, 1975
Claim #2018-79400

Attn: Claim Agent

506009

Gentlemen:

The attached claim papers are in support of our claim 2018-79400 filed for $630.00 to cover loss of a shipment we made on 3/14/74 to McClellan AFB, Dept. F-Bldg. 1407, McClellan, Calif.

Please acknowledge receipt of the attached claim papers and allow us your check to cover.

Yours with "American Greetings"

James H. Edler

James H. Edler
Corporate Director of Traffic

JHE/kr

APPENDIX 34

STANDARD FORM FOR PRESENTATION OF LOSS AND DAMAGE CLAIM

Approved by the Interstate Commerce Commission, the National Industrial Traffic League, the Freight Claim Association

Westransco Cleveland, Ohio Claimant's No. XXX 2018-79400

P.O. Box 5810 Date 5/30/75 Carrier's No.

Los Angeles, Calif. 90054

506009

This claim for $ 630.00 is made against the carrier named above by American Greetings Corp. for loss in connection with the following described shipment:

Description of shipment 20 ctns Earthenware 640#

Name and address of consignor (Shipper) American Greetings Corporation, RFD #1, Osceola, Arkansas

Shipped From Osceola, Arkansas To M83368

Final Destination Routed Via

B. L. issued by American Greetings Corp. B. L. Date 593389 3/14/74

Bl. Freight Bill (Pro) No. 361412-034 3/22/74 Original Car No.

Name and address of Consignee McClellan AFB, Dept. F-Bldg. 1407, McClellan, Calif.

DETAILED STATEMENT SHOWING HOW AMOUNT CLAIMED IS DETERMINED

See invoice attached	$630.00
Total Amount Claimed	$630.00

IN ADDITION TO INFORMATION GIVEN ABOVE, THE FOLLOWING DOCUMENTS ARE SUBMITTED IN SUPPORT OF THIS CLAIM.

(*) 1. Original paid freight ("Expense") bill
(X) 2. Original invoice or certified copy
(X) 3. Original B. L. if not previously surrendered to carrier.
( ) 4. Other particulars obtainable in proof of loss or damage claimed:

Remarks: * Bond of Indemnity in lieu of original paid freight bill.

This shipment was involved in an accident and considered a total loss. American Greetings was not notified until April, 1975.

The foregoing statement of facts is hereby certified to as correct.

American Greetings Corp.

APPENDIX 35

TP-4 7-74

American Greetings Corporation

Westransco
P.O. Box 54310
Los Angeles, Calif. 90054

May 30, 1975
File # 2018-79500

Attn: Claim Agent

506006

Gentlemen:

The attached claim papers are in support of our claim 2018-79500 filed in the amount of $[illegible]60.00 to cover loss of a shipment we made on 3/14/74 to Mather AFB, Bldg. 3636, Mather AFB, Calif.

Please acknowledge receipt of the attached claim papers and allow us your check to cover.

Yours with "American Greetings"

James H. Edler

James H. Edler
Corporate Director of Traffic

JHE/kr

APPENDIX 36

STANDARD FO[illegible] FOR PRESENTATION OF LOSS AN[illegible] DAMAGE CLAIM

Approved by the Interstate Commerce Commission, the National Industrial Traffic League, the Freight Claim Association

Westransco Cleveland, Ohio Claimant's No. 2018-79500

P. O. Box 54810 Date 5/30/75 Carrier's No. 506006

Los Angeles, Calif. 90054

This claim for $1260.00 is made against the carrier named above

By American Greetings Corp. for loss in connection with the following described shipment:

Description of shipment 40 ctns Earthenware 1230#

Name and address of consignor (Shipper) American Greetings Corp., RFD #1, Osceola, Ark

Shipped From Osceola, Arkansas To MB3,68

Final Destination Routed Via

B. L. issued by American Greetings Corp. B. L. Date 553330 3/14/74

Pd. Freight Bill (Pro) No. 361442-016 3/22/74 Original Car No.

Name and address of Consignee Mather AFB, Bldg. 3636, Mather AFB, Calif.

DETAILED STATEMENT SHOWING HOW AMOUNT CLAIMED IS DETERMINED

See invoice attached	$1260.00
Total Amount Claimed	$1260.00

IN ADDITION TO INFORMATION GIVEN ABOVE, THE FOLLOWING DOCUMENTS ARE SUBMITTED IN SUPPORT OF THIS CLAIM.

(*) 1. Original paid freight ("Expense") bill
(X) 2. Original invoice or certified copy
(X) 3. Original B. L. if not previously surrendered to carrier.
( ) 4. Other particulars obtainable in proof of loss or damage claimed:

APPENDIX 37

Remarks: *Bond of Indemnity in lieu of original paid freight bill.

This shipment was involved in an accident and was considered a total loss. American Greetings was not notified until April, 1975

The foregoing statement of facts is hereby certified to as correct.

American Greetings Corp.

American Greetings Corporation

5060/1

Westransco
P.O. Box 54810
Los Angeles, Calif. 90054

May 30, 1975
File # 2018-79200

Attn: Claim Agent

Gentlemen:

The attached claim papers are in support of our claim 2018-79200 filed for $2733.70 to cover loss of a shipment we made on 3/14/74 to Travis AFB, Br.1005-Bldg. 650, Travis AFB, Calif.

Please acknowledge receipt of the attached claim papers and allow us your check to cover.

Yours with "American Greetings"

James H. Edler

James H. Edler
Corporate Director of Traffic

JHE/kr

APPENDIX 38

STANDARD FORM FOR PRESENTATION OF LOSS AND DAMAGE CLAIM

Approved by the Interstate Commerce Commission, the National Industrial Traffic League, the Freight Claim Association

Westransco Cleveland, Ohio Claimant's No. 2018-79200

P.O. Box 54810 Date 5/30/75 Carrier's No.

Los Angeles, Calif. 90054 506007

This claim for $ 2733.70 is made against the carrier named above

By American Greetings Corp. for loss in connection with the following described shipment:

Description of shipment 18 ctns Mothers Day cards 615

Name and address of consignor (Shipper) American Greetings Corp., RFD #1, Osceola, Ark.

Shipped From Osceola, Arkansas To M 83363

Final Destination Routed Via

B. L. issued by American Greetings Corp. B. L. Date 3/14/74

Pd. Freight Bill (Pro) No. 361412-002 3/22/74 Original Car No.

Name and address of Consignee Travis AFB, Br. 1005-Bldg. 650, Travis AFB., Calif.

DETAILED STATEMENT SHOWING HOW AMOUNT CLAIMED IS DETERMINED

See invoice attached	$2733.70

Total Amount Claimed $2733.70

IN ADDITION TO INFORMATION GIVEN ABOVE, THE FOLLOWING DOCUMENTS ARE SUBMITTED IN SUPPORT OF THIS CLAIM.

(*) 1. Original paid freight ("Expense") bill
(X) 2. Original invoice or certified copy
(X) 3. Original B. L. if not previously surrendered to carrier.
( ) 4. Other particulars obtainable in proof of loss or damage claimed:

APPENDIX 39

Remarks: *Bond of Indemnity in lieu of original paid freight bill.

This shipment was involved in an accident and is considered a total loss. American Greetings was not notified until ~~XXXX~~ April, 1975

The foregoing statement of facts is hereby certified to as correct.

American Greetings Corp.

American Greetings Corporation

Westransco
P.O. Box 54810
Los Angeles, Calif. 90054

May 30, 1975
File # 2018-79400

Attn: Claim Agent

506008

Gentlemen:

The attached claim papers are in support of our claim 2018-79400 filed for $2478.20 to cover loss of a shipment we made on 3/14/74 to McClellan AFB, Dept. F-Bldg. 1407, McClellan, Calif.

Please acknowledge receipt of the attached claim papers and allow us your check to cover.

Yours with "American Greetings"

James H. Edler

James H. Edler
Corporate Director of Traffic

JHE/kr

APPENDIX 40

STANDARD FORM FOR PRESENTATION OF LOSS AND DAMAGE CLAIM

Approved by the Interstate Commerce Commission, the National Industrial Traffic League, the Freight Claim Association

Westransco Cleveland, Ohio Claimant's No. 2013-79400

P.O. Box 54310 Date 5/30/75 Carrier's No.

Los Angeles, Calif. 90054 506008

This claim for $ 2478.20 is made against the carrier named above

By American Greetings Corp. for loss in connection with the following described shipment:

Description of shipment 23 ctns Mothers Day cards 517#

Name and address of consignor (Shipper) American Greetings Corp., RFD #1, Osceola, Ark.

Shipped From Osceola, Arkansas To M 83368

Final Destination Routed Via

B. L. issued by American Greetings Corp. B. L. Date 3/14/74

Pd. Freight Bill (Pro) No. 361412-018 3/22/74 Original Car No.

Name and address of Consignee McClellan AFB, Dept. F-Bldg. 1407, McClellan, Calif.

DETAILED STATEMENT SHOWING HOW AMOUNT CLAIMED IS DETERMINED

See invoice attached	$2478.20

Total Amount Claimed $2478.20

IN ADDITION TO INFORMATION GIVEN ABOVE, THE FOLLOWING DOCUMENTS ARE SUBMITTED IN SUPPORT OF THIS CLAIM.

(*) 1. Original paid freight ("Expense") bill
(X) 2. Original invoice or certified copy
(X) 3. Original B. L. if not previously surrendered to carrier.
( ) 4. Other particulars obtainable in proof of loss or damage claimed:

APPENDIX 41

Remarks: *Bond of Indemnity in lieu of original paid freight bill.

This shipment was involved in an accident and was considered a total loss. American Greetings was not notified until ~~xxxxxx~~ April, 1975.

The foregoing statement of facts is hereby certified to be correct.

American Greetings Corp.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

---------- X

AMERICAN GREETINGS CORPORATION,

Plaintiff,

-against-

WESTRANSCO FREIGHT COMPANY, INC.,

Defendant.

Index No. 75 Civ 5139

Judge Metzner

----------X

WESTRANSCO FREIGHT COMPANY, INC.,

Third-Party Plaintiff,

-against-

ASSOCIATED FREIGHT LINES, INC.,

Third-Party Defendant.

STATEMENT PURSUANT TO RULE 9(g) OF THE RULES OF THIS COURT

----------X

STATE OF NEW YORK)
ss.:
COUNTY OF NEW YORK)

I. J. KIRSCHENBAUM, being duly sworn, deposes and says:

I am an attorney at law admitted to practice in this Court and associated with TELL, CHESER, BREITBART & LEFKOWITZ, attorneys for the defendant in the above entitled action.

APPENDIX 42

Pursuant to the provisions of Rule 9(g) of the Rules of this Court, I hereby state the following:

This action was brought by plaintiff to recover the sum of $11,528.49 alleged to be the value of five shipments which defendant received from plaintiff at Osceola, Kansas, on March 14, 1974, to be transported in interstate commerce for delivery to various designated consignees in California.

These shipments were all subject to the terms and conditions of the Uniform Bill of Lading which in § 2(b) thereof requires that as a condition precedent to any recovery a claimant must prove filing of a claim in writing within the period of time therein set forth.

Although defendant concedes that the shipments were damaged while in transit and never delivered to the designated consignees, defendant nevertheless claims that there is no liability for these shipments because of plaintiff's failure to show compliance with the foregoing condition precedent.

I.J. Kirschenbaum

Sworn to before me this

22nd day of March, 1976

Notary Public, State of New York
No. 30-5680000
Qualified in Nassau County
Term Expires 76

APPENDIX 43

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

---------- X

AMERICAN GREETINGS CORPORATION

Plaintiff,

-against-

WESTRANSCO FREIGHT COMPANY, INC.,

Defendant.

---------- X

WESTRANSCO FREIGHT COMPANY, INC.,

Third-Party Plaintiff,

-against-

ASSOCIATED FREIGHT LINES, INC.,

Third-Party Defendant.

---------- X

75 Civil 5139

Judge Metzner

DEFENDANT'S ANSWERS TO PLAINTIFF'S INTERROGATORIES

Defendant, by TELL, CHESER, BREITBART & LEFKOWITZ, its attorneys, answer plaintiff's interrogatories as follows:

1. In what state is defendant, WESTRANSCO FREIGHT COMPANY, INC. ("Westransco") incorporated?

Answer: Illinois.

2. Is Westransco authorized by the Interstate Commerce Commission to operate as a freight forwarder in interstate commerce? If so, state the docket number under which a freight forwarder permit was granted to Westransco.

Answer: Yes. Sixth Amended Permit and Order No. FF-52, dated December 29, 1967.

APPENDIX 44

3. Is Westransco a participant in a tariff known as the National Motor Freight Classification? Did it participate in said tariff in March and April of 1974?

Answer: Yes.

4. Did Westransco receive on or about March 14, 1974 five (5) shipments tendered by AMERICAN GREETINGS CORPORATION ("American Greetings") at Osceola, Arkansas for transportation to destinations in California?

Answer: Yes. Defendant concedes the receipt of the five shipments referred to in paragraph 6 of the complaint.

5. Was a bill of lading incorporating the terms and conditions of the Uniform Domestic Straight Bill of Lading issued by Westransco for any or all of these shipments? Please attach a copy of each bill of lading to your answers.

Answer: Yes. Copies of the bills of lading are annexed.

6. For each shipment, name the consignee and the place of delivery specified by the bill of lading.

Answer: Name of consignee and address are set forth in the bill of lading.

7. For each shipment, state how the commodity shipped was described on the bill of lading.

Answer: See annexed bills of lading.

8. State the weight and number of pieces or packages in each shipment.

Answer: See annexed bills of lading.

9. Did the bill of lading for each shipment show that the shipment was received by Westransco "in apparent good order except as noted)contents and condition of contents of packages unknown)"? Were any exceptions noted on the bill of lading to this statement? If so, describe all such exceptions in full.

Answer: Yes - no exceptions.

APPENDIX 45

10. State the name and address of all underlying carriers employed by Westransco to perform the transportation of the shipments at issue in this suit.

Answer: Freightways Express Inc., 1749 Florida Street, Memphis, Tennessee 38109, and Associated Freight Lines, 841 Folger Avenue, Berkeley, California 94710, acted for and on behalf of defendant.

11. Did Westransco or any carrier acting for it deliver any of these five shipments to the consignee at the destination specified by the shipper?

Answer: No.

12. Was each of the shipments at issue in this action totally destroyed during transportation?

Answer: Otha Jones, driver for Associated Freight Lines, was involved in an accident at 8:05 p.m. on March 27, 1974, on the Oakland side of the San Francisco-Oakland Bay Bridge. Heavy rain was falling at the time. Most of the shipments were thrown out of the vehicle at impact and scattered on the floor of the bridge. In an effort to clear the bridge for traffic, the bridge authorities dispatched skip loaders and dump trucks to the scene of the accident. The skip loaders scooped up the shipments and deposited them in the dump trucks. The trucks then dumped the shipments in an open area near the toll gates. Rain continued to fall and by that time it was almost impossible to identify any of the shipments.

13. State when and how Westransco obtained the information given in answer to the preceding question.

Answer: On April 12, 1974, from defendant's San Francisco office.

14. If the shipments were not delivered to the consignee describe the incidents or occurrences which prevented such delivery. Describe in detail the date, time, place, and tupe of occurrence which prevent delivery. Give the names and addresses of witnesses having knowledge of the incident or occurrence.

Answer: See answer to No. 12 above.

APPENDIX 46

15. Has American Greetings paid freight charges for any of these five (5) shipments to Westransco? If so, state the date and amounts paid by American Greetings.

Answer: Freight charges have been paid in the following amounts: $83.50 on 28 cartons to Mather AFB; $122.62 on 40 cartons to Mather AFB; $61.32 on 18 cartons to Travis AFB; $51.34 on 23 cartons to McClellan AFB; $63.81 on 20 cartons to McClellan AFB.

16. Did Westransco send any notice of the incident or occurrence to American Greetings or to any other person, firm, corporation or governmental entity? If so, state when and to whom such notice was sent and attach a copy of said notice to your answers.

Answer: Yes. For each shipment defendant sent a Notice on April 19, 1974 in the form annexed to shipper and consignee.

17. Did Westransco file a claim in writing for the loss of any of the shipments at issue in this suit with any underlying carrier performing transportation of the shipments? If so, state the date on which such claim or claims were filed, with whom they were filed and the nature of the claim as filed. Attach to your answers a copy of each such claim filed by Westransco.

Answer: Immaterial to the issues in this case.

18. Did Westransco conduct any investigation of the reasons of non-delivery of these shipments? If so, state when, where and by whom such investigations were conducted, and give in detail the results of all such investigations. If any reports, memoranda or other notations were made during or as a result of such investigations, attach copies thereof to your answers.

Answer: No investigation by defendant.

19. Identify every individual whom you expect to or may call as a witness at the trial of this case, and state whether each witness will be called as an expert or a factual witness.

Answer: Defendant is presently of the opinion that there will be no trial. Should one be required, defendant will at that time endeavor to provide the answer to the interrogatory.

20. For each expert witness identified in response to the previous

interrogatory, state the subject matter on which the expert is expected to testify, state the substance of the facts and opinions to which the expert is expected to testify, state the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion.

Answer: See answer to No. 19.

TELL, CHESER, BREITBART &
LEFKOWITZ
Attorneys for Defendant
116 John Street
New York, N.Y. 10038

By _____
A Member of the Firm

TO:

ARSHAM & KEENAN, ESQS.
Attorneys for Plaintiff
277 Park Avenue
New York, N.Y. 10017

HILL, RIVKINS, CAREY, LOESBERG & O'BRIEN, ESQS.
Attorneys for Third-Party Deft, Associated Freight Lines, Inc.
96 Fulton Street
New York, N.Y. 10038

APPENDIX 48

MEMORANDUM — To an acknowledgement that a Bill of Lading has been issued and is not the Original Bill of Lading, nor a copy or duplicate, covering the property named herein, and is intended solely for filing or record.

CARRIER, subject to the classifications and tariffs in effect on the date of the receipt by the carrier of the property described in the Original Bill of Lading.

3-24-74

SHIPPER'S NO. 3D 593393

56825

DATE

FROM:

- [x] AMERICAN GREETINGS CORPORATION
- [ ] FORGET-ME-NOT CARDS
- [ ] LAUREL CARDS

AT OSCEOLA, ARKANSAS

[illegible] 4735
[illegible] 3535
[illegible] California 95555

[illegible] 2 West 25

Pkg. Qty. Pkgs.		Kind of Package, Description of Articles, Special Marks and Exceptions	* Weight (Subj. to Corr.)	Class or Rate	✓
[illegible]		Prof. Engr Litho Greeting Cards N.O.I., PSL	915		
		Wrapping Paper, Rolled, L/T 25 FT. PSL			
		Wrapping Paper, N.O.I.			
		Ribbon Bows			
		Ribbon, N.O.I. L/T 25 Continuous Yds.			
		Paper Napkins, Place Mats, Table Cloths, PSL			
		Store Display Racks, N.O.I., KD - GTF — WIRE [ ] O'T WIRE [ ]			
		Store Display Racks, N.O.I., KDF — FIBD. [ ] O'T FIBD [ ]			
		Store Display Racks, N.O.I., SU - GTF — M/N WIRE [ ] O'T WIRE [ ]			
		Paper Bags, N.O.I.			
		Dishes, Plates, Trays, N.O.I., Nested, Palpbd.			
		Cups, Dishes, Paper or Palpbd. N.O.I. Nested.			
		Plastic Articles N.O.I. — L/T 2 c.f. [ ] 2-4 c.f. [ ] 4-6 c.f. [ ] 6-12 c.f. [ ] 12-15 c.f. [ ] over 15 c.f. [ ]			
		Candles N.O.I.			
		Confectionery or Chocolate N.O.I. Val. Not Exceeding $20.00 Per Lbs.			
		Articles Novelty N.O.I., PSL			
		POP TEPL			
		TOTAL PACKAGES			

Subject to Sec. 7 of conditions of applicable bill of lading, if this shipment is to be delivered to the consignee without recourse on the consignor, the consignor shall sign the following statement:

The carrier shall not make delivery of this shipment without payment of freight and all other lawful charges.

Per _____
Signature of Consignor

If charges are to be prepaid, write or stamp here, "To be Prepaid."

PREPAID

Rec'd $ _____ to apply in prepayment of the charges on the property described hereon.

Agent or Cashier

Per _____
The signature here acknowledges only the amount prepaid.

Charges advanced

$

*The freight charges are based on the shipment weight as the same has been set forth in the bill of lading covering the shipment and on other requirements of the Uniform Freight Classification and/or of the National Motor Freight Classification.

*Shipper's weight is not to be stamped a part of bill of lading approved by the Interstate Commerce Commission.

PROBILL NO. 5011- 10500 11 4-0

If the shipment moves between two ports by water, the law requires that the bill of lading shall state whether it is "carrier's or shipper's weight."

NOTE — Where the rate is dependent on value, shippers are required to state specifically in writing the agreed or declared value of the property.

The agreed or declared value of the property is hereby specifically stated by the shipper to be not exceeding $ _____ per _____

AMERICAN GREETINGS CORP.
10500 AMERICAN ROAD
CLEVELAND, OHIO 44144
(PERMANENT POST OFFICE ADDRESS)

COD
REMAIT PEMITTANCE TO
AMOUNT
CHARGE
TOTAL

AGENT
ARK. TRAV., INC.
PER

APPENDIX 49

S MEMORANDUM is an acknowledgement that a Bill of Lading has been issued and is not the Original Bill of Lading, nor a copy or duplicate, covering the property named herein, and is intended solely for filing or record.

CEIVED, subject to the classifications and rates in effect on the date of the receipt by the carrier of the property described in the Original Bill of Lading.

3/14/74 56817

DATE

SHIPPER'S NO. 3D 593380

FROM:

- AMERICAN GREETINGS CORPORATION
- FORGET-ME-NOT CARDS
- LAUREL CARDS

AT OSCEOLA, ARKANSAS

CONSIGNED TO:

[illegible] AR 4795

[illegible] 333

[illegible] Indian AR California 95655

[illegible] Watts 25

No. of Pkgs. Total	Sol.	Kind of Package, Description of Articles, Special Marks and Exceptions	* Weight (Sub. to Cor.)	Class or Rate	✓
		Prod. Engr. Lithe Greeting Cards N.O.I., RR			
		Wrapping Paper, Rolled, L/T 25 FT. RSL			
		Wrapping Paper, N.O.I.			
		Paper Novelties			
		Ribbon, N.O.I. L/T 21 Continuous Yds.			
		Paper Napkins, Placemats, Table Cloths, RSL			
		Store Display Racks, N.O.I., KD - OTP WIRE ☐ O'T WIRE ☐			
		Store Display Racks, N.O.I., KD FIBD. ☐ O'T FIBD. ☐			
		Store Display Racks, N.O.I., SU - OTP N'N WIRE ☐ O'T WIRE ☐			
		Paper Bags, N.O.I.			
		Dishes, Pitchers, Trays, N.O.I., Nested, Polyethylene			
		Cups, Drinking, Paper or Plastic, N.O.I. Nested			
		Display Articles N.O.I. L/T 2 c.f. ☐ 2-4 c.f. ☐ 4-6 c.f. ☐			
		6-12 c.f. ☐ 12-15 c.f. ☐ over 15 c.f. ☐			
		Confetti N.O.I.			
		[illegible] Charges to C.I. Rel. Value Not Exceeding $2.00 Per lb.	1220		
		[illegible] N.O.I., RSL			
		WO- 237173			
		TOTAL PACKAGES			

Subject to Section 7 of conditions of applicable bill of lading, if this shipment is to be delivered to the consignee without recourse on the consignor, the consignor shall sign the following statement.

The carrier shall not make delivery of this shipment without payment of freight and all other lawful charges.

Per _____ (Signature of Consignor)

If charges are to be prepaid, write or stamp here, "To be Prepaid."

PREPAID

Rec'd $ _____ to apply in prepayment of the charges on the property described hereon.

Agent or Cashier

Per _____

The signature here acknowledges only the amount prepaid.

Charges advanced

$

*The bills covered used for this shipment conform to the specifications set forth in the box marked "Consignee" and all other requirements of the Uniform Freight Classification and Rules of the National Motor Freight Classification.

*Shipper's manifest or list of items may be part of bill of lading approved by the Interstate Commerce Commission.

C.O.D. NO.

[illegible] 22 [illegible]

[illegible] between two points by [illegible] the [illegible] "carrier's [illegible]"

NOTE — Where the rate is dependent on value, shippers are required to state specifically in writing the agreed or declared value of the property.

The agreed or declared value of the property is hereby specifically stated by the shipper to be not exceeding _____ per _____

AMERICAN GREETINGS CORP.
10500 AMERICAN ROAD
CLEVELAND, OHIO 44144
(PERMANENT POST OFFICE ADDRESS)

PER [illegible]

COD
REMIT REMITTANCE TO

AMOUNT

CHARGE

TOTAL

ARK. TRAV., INC.

PER

APPENDIX 50

MEMORANDUM — It is acknowledged that a Bill of Lading has been issued and is not the Original Bill of Lading, nor a copy or duplicate, covering the property named herein, and is intended solely for filing or record.

REMARK, subject to the classifications and rates in effect on the date of the receipt by the carrier of the property described in the Original Bill of Lading.

SHIPPER'S NO. 3D 533932

56809

TO:

[illegible] 4792
[illegible] 1005 Bldg 650
[illegible] AFB California 94535

[illegible]
Attn: General Mgr

DATE

FROM:

- [X] AMERICAN GREETINGS CORPORATION
- [ ] FORGET-ME-NOT CARDS
- [ ] LAUREL CARDS

AT OSCEOLA, ARKANSAS

No. of Pcgs. Pkgs.	Bdls.	Kind of Package, Description of Articles, Special Marks and Exceptions	* Weight (Sub. to Cor.)	Class or Rate	✓
[illegible]		Prod. Engr Lamp Greeting Cards N.O.I., RSL	615		
		Wrapping Paper, Rolled, L/T 25 FT. RSL			
		Wrapping Paper, N.O.I.			
		Ribbon Bazooka			
		Ribbon, N.O.I. L/T 2a Continuous V.L.			
		Paper Napkins, Place Mats, Table Cloths, RSL			
		Store Display Racks, N.O.I., KD - OTF — WIRE [ ] O'T WIRE [ ]			
		Store Display Racks, N.O.I., KD* — F.BD. [ ] O'T F.BD. [ ]			
		Store Display Racks, N.O.I., KD - OTF — N.N.WIRE [ ] O'T WIRE [ ]			
		Paper Bags, N.O.I.			
		Clothes, Paper, Trees, N.O.I., Nested, Folded.			
		Cards, Greeting, Paper or Pulpbd, N.O.I. Nested.			
		Phone Amulets N.O.I. — L/T 2 c.f. [ ] 2-6 c.f. [ ] 6-4 c.f. [ ] 6-12 c.f. [ ] 12-15 c.f. [ ] over 15 c.f. [ ]			
		Candles N.O.I.			
		[illegible]			
		[illegible] N.O.I., Pd 22- 72721			
		TOTAL PACKAGES			

Subject to Section 7 of conditions of applicable bill of lading, if this shipment is to be delivered to the consignee without recourse on the consignor, the consignor shall sign the following statement.

The carrier shall not make delivery of this shipment without payment of freight and all other lawful charges.

Per _____
Signature of Consignor

If charges are to be prepaid, write or stamp here, "To be Prepaid."

PREPAID

Rec'd $ _____
to apply in prepayment of the charges on the property described hereon.

Agent or Cashier

Per _____
The signature here acknowledges only the amount prepaid.

Charges advanced
$

*The labor contained in this shipment conform to the specifications set forth in the box maker's certificate thereon, and all other requirements of the Uniform Freight Classification and Rules of the National Motor Freight Classification.

Shipper's name or stamp, not a part of bill of lading approved by the Interstate Commerce Commission.

SEAL NO.

[illegible] 11 [illegible]

NOTE — Where the rate is dependent on value, shippers are required to state specifically in writing the agreed or declared value of the property.

The agreed or declared value of the property is specifically stated by the shipper to be not exceeding _____ per _____

AMERICAN GREETINGS CORP.
10500 AMERICAN ROAD
CLEVELAND, OHIO 44144
(PERMANENT POST OFFICE ADDRESS)

COD
REMIT REMITTANCE TO
PAID NET
CHARGE
TOTAL

ARK. TRANSFER & STORAGE CO.

PER

APPENDIX 51

THIS MEMORANDUM is an acknowledgement that a Bill of Lading has been issued and is not the Original Bill of Lading, nor a copy or duplicate, covering the property named herein, and is intended solely for filing or record.

RECEIVED, subject to the classifications and rates in effect on the date of the receipt by the carrier of the property described on the Original Bill of Lading.

SHIPPER'S NO. 3D593829

CONSIGNED TO:

McClellan AFB
Dept. F Bldg 1407
McClellan California CA 95652

3/24/78 56810

DATE

FROM:

- [x] AMERICAN GREETINGS CORPORATION
- [ ] FORGET-ME-NOT CARDS
- [ ] LAUREL CARDS

AT OSCEOLA, ARKANSAS

CARRIER: ATI 3/24/78 25

NO. OF PKGS. PKGS.	BDLS.	Kind of Package, Description of Articles, Special Marks and Exceptions	* Weight (Subj. to Cor.)	Class or Rate	✓
22		Prod. Engr Lithe Greeting Cards N.O.I., RSL	527		
		Wrapping Paper, Metallic, L/T 25 FT. RSL			
		Wrapping Paper, N.O.I.			
		Ribbon Reserves			
		Ribbon, N.O.I. L/T 25 Continuous Yds.			
		Paper Napkins, Place Mats, Table Cloths, RSL			
		Store Display Racks, N.O.I., KD - OTP WIRE [ ] O'T WIRE [ ]			
		Store Display Racks, N.O.I., KDF FIBD. [ ] O'T FIBD. [ ]			
		Store Display Racks, N.O.I., SU - OTP IN'N WIRE [ ] O'T WIRE [ ]			
		Paper Bags, N.O.I.			
		Dishes, Plates, Trays, N.O.I., Nested, Pulpbd.			
		Cups, Drinking, Paper or Pulpbd, N.O.I. Nested.			
		Plastic Annoies N.O.I. L/T 2 c.f. [ ] 2-4 c.f. [ ] 4-6 c.f. [ ] 6-12 c.f. [ ] 12-15 c.f. [ ] over 15 c.f. [ ]			
		Candles N.O.I.			
		Confectionery Chocolate N.O.I. Del. Value Not Exceeding $2.00 Per Lb.			
		Ass. Novelties N.O.I.			
		PO# 72717			
		TOTAL PACKAGES			

Subject to Section 7 of conditions of applicable bill of lading, if this shipment is to be delivered to the consignee without recourse on the consignor, the consignor shall sign the following statement.

The carrier shall not make delivery of this shipment without payment of freight and all other lawful charges.

Per _____
(Signature of Consignee)

If charges are to be prepaid, write or stamp here, "To be Prepaid."

PREPAID

Rec'd $ _____ to apply in prepayment of the charges on the property described hereon.

Agent or Cashier

Per _____

The signature here acknowledges only the amount prepaid.

Charges advanced

$

*The above commodities covered by this shipment conform to the specifications set forth in the box maker's certificate thereon and all other requirements of the Uniform Freight Classification and Rules of the National Motor Freight Classification.

*Shipper's weight is not to be used in lieu of scales nor part of bill of lading approved by the Interstate Commerce Commission.

NO. OF PCS. 2[illegible]-[illegible]433 11 4/1

* Subject to Section 7 of conditions, if this shipment is to be delivered to the consignee without recourse on the consignor, the consignor shall sign the following statement: "The carrier shall not make delivery of this shipment without payment of freight and all other lawful charges."

NOTE — Where the rate is dependent on value, shippers are required to state specifically in writing the agreed or declared value of the property.

The agreed or declared value of the property is hereby specifically stated by the shipper to be not exceeding _____ per _____

AMERICAN GREETINGS CORP.
10500 AMERICAN ROAD
CLEVELAND, OHIO 44144
(PERMANENT POST OFFICE ADDRESS)

PER

COD
MAIL REMITTANCE TO

AMOUNT

CHARGE

TOTAL

ARK AGENCY, INC.

PER

APPENDIX 52

MEMORANDUM — is an acknowledgement that a Bill of Lading has been issued and is not the Original Bill of Lading, nor a copy or duplicate, covering the property named herein, and is intended solely for filing or record.

RECEIVED, subject to the classifications and tariffs in effect on the date of the receipt by the carrier of the property described in the Original Bill of Lading.

SHIPPER'S NO. 5682 3D 533389

CONSIGNED TO:

McClellan AFB
Bldg 1407
McClellan California 95652

DATE

FROM:

- [x] AMERICAN GREETINGS CORPORATION
- [ ] FORGET-ME-NOT CARDS
- [ ] LAUREL CARDS

AT OSCEOLA, ARKANSAS

NO. OF PKGS.		Kind of Package, Description of Articles, Special Marks and Exceptions	* Weight (Sub. to Cor.)	Class or Rate	✓
		Bd. Eng Lithe Greeting Cards N.O.I., RSL			
		Wrapping Paper, Rolled, L/T 25 FT. PSL			
		Wrapping Paper, N.O.I.			
		Ribbon Paper			
		Ribbon, N.O.I. L/T 25 Commodity Rate			
		Paper Napkins, Place Mats, Table Cloths, RSL			
		Store Display Racks, N.O.I., KD-OTF WIRE [ ] OT WIRE [ ]			
		Store Display Racks, N.O.I., KDF FIBD. [ ] OT FIBD. [ ]			
		Store Display Racks, N.O.I., SU-OTF N'N WIRE [ ] OT WIRE [ ]			
		Paper Bags, N.O.I.			
		Dishes, Plates, Trays, N.O.I., Sealed, Pulpbd.			
		Cups, Drinking, Paper or Pulpbd, N.O.I. Sealed.			
		Plastic Articles N.O.I. L/T 2 c.f. [ ] 2-6 c.f. [ ] 6-6 c.f. [ ] 6-12 c.f. [ ] 12-25 c.f. [ ] over 25 c.f. [ ]			
		Candles N.O.I.			
3		Christmas or Chanukah N.O.I. Val. Value Not Exceed — $50.00 Per Pkg	640		
		HO# 237173			
		Assortment N.O.I., RS.			
		TOTAL PACKAGES			

Subject to Section 7 of conditions of applicable bill of lading, if this shipment is to be delivered to the consignee without recourse on the consignor, the consignor shall sign the following statement.

The carrier shall not make delivery of this shipment without payment of freight and all other lawful charges.

Per _____
Signature of Consignor

If charges are to be prepaid write or stamp here, "To be Prepaid."

PREPAID

Rec'd $ _____ to apply in prepayment of the charges on the property described hereon.

Agent or Cashier

Per _____
The signature here acknowledges only the amount prepaid.

Charges advanced
$

* The rates and charges used for this shipment conform to the specifications set forth in the applicable contract carrier tariffs and to the requirements of the Uniform Bill of Lading of the National Motor Freight Classification.

*This space is reserved for a rate stamp not a part of bill of lading approved by the Interstate Commerce Commission.

INVOICE NO.

[illegible] 7300 11 4-03

If the agreement between the parties hereto or by order, the law requires that the actual weight be shown whether as "correct" or "shipper's weight."

NOTE — Where the rate is dependent on value, shippers are required to state specifically in writing the agreed or declared value of the property.

The agreed or declared value of the property is specifically stated by the shipper to be not exceeding _____

AMERICAN GREETINGS CORP.
10500 AMERICAN ROAD
CLEVELAND, OHIO 44144
(PERMANENT POST OFFICE ADDRESS)

COD
MAIL REMITTANCE TO

AMOUNT

CHARGE

TOTAL

AGENT
ARK. TRAV., INC.

PER

APPENDIX 53

WESTRANSCO

Freight Forwarders since 1974

[illegible] Main Street
P.O. Box 54810
Los Angeles, California 90054
Phone (213) 227 9141

April 19, 1974

Mather AFB 4795
Building 3636
Mather, A. F. B., California

Gentlemen:

We have been informed by our San Francisco terminal that shipment(s) as shown was (were) involved in an accident and is considered a total loss.

8 Prtd Engr Litho gre crds and 20 prtd engr litho gre crds weight 916 pounds - shipper- American Greeting - 593393 56825

Copy(copies) of our billing is attached for your ready reference and to assist you in filing claim.

We extend our sincere apology for the inconvenience undoubtedly caused you over this matter.

Very truly yours,

WESTRANSCO

D. Villa
Claim Agent

DV:hs
Att:
cc: American Greeting Corp.
Box 468
Osceaola, Arkansas 72370

cc:

APPENDIX 54

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
----------X

AMERICAN GREETINGS CORPORATION,

Plaintiff,

v.

WESTRANSCO FREIGHT COMPANY, INC.

Defendant,

v.

ASSOCIATED FREIGHT LINES, INC.,

Third-Party Defendant
----------X

75 Civil 5139 (CMM)

NOTICE OF CROSS-MOTION FOR SUMMARY JUDGMENT AND OTHER RELIEF

PLEASE TAKE NOTICE that upon the affidavit of James Edler, sworn to the 5th day of April, 1976, and upon copies of the pleadings and exhibits annexed hereto, and upon defendant's notice of motion for summary judgment and pleadings and exhibits annexed thereto, the plaintiff will cross-move before the Honorable Charles M. Metzner, United States District Judge, in Room 2201, United States Courthouse, Foley Square, New York, New York on the 27th day of April, 1976, at ten o'clock in the forenoon of that day:

1. For summary judgment in the amount of $10,208.88 pursuant to Rule 56 of the Federal Rules of Civil Procedure on the grounds that there is no genuine issue of fact, and plaintiff is entitled to judgment as a matter of law;

APPENDIX 55

2. Alternatively, for leave to amend its complaint herein by filing the proposed amended complaint annexed hereto.

Dated: April 8, 1976

ARSHAM & KEENAN
Attorneys for Plaintiff
277 Park Avenue
New York, N.Y. 10017
(212) PLaza 9-1000

By Martin S. Sintow

TO: TELL, CHESER, BREITBART & LEFKOWITZ
Attorneys for Defendant

HILL, RIVKINS, CAREY, LOESBERG & O'BRIEN
Attorneys for Third-Party Defendant

APPENDIX 56

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
----------X

AMERICAN GREETINGS CORPORATION,

Plaintiff,

v.

WESTRANSCO FREIGHT COMPANY, INC.,

Defendant,

v.

ASSOCIATED FREIGHT LINES, INC.,

Third-Party Defendant.
----------X

75 Civil 5139 (CMM)

AFFIDAVIT

STATE OF OHIO)
) ss.:
COUNTY OF)

JAMES EDLER, being duly sworn, deposes and says:

1. I am employed by plaintiff, AMERICAN GREETINGS CORPORATION, as Corporate Director of Traffic. I am fully familiar with the facts at issue herein. I have previously testified at an oral deposition in this action held on December 24, 1975.

2. On or about March 14, 1974 AMERICAN GREETINGS CORPORATION ("American Greetings") tendered to an agent of defendant, WESTRANSCO FREIGHT COMPANY, INC. ("Westransco") three shipments of greeting cards and two shipments of Earthenware for transportation from Osceola, Arkansas to various U. S. Air Force installations located in California. None of these shipments was ever delivered to the consignee.

APPENDIX 57

3. I have reviewed defendant's answers to plaintiff's initial interrogatories which are annexed to this affidavit. The facts in our possession confirm the factual answers supplied by defendant; and where we have no direct knowledge of the facts we accept the facts stated therein by defendant.

4. The true value of each shipment, as specified in the invoice to the customer, is shown in the following table:

COMMODITY	DESTINATION	VALUE
Greeting Cards	Mather A.F.B.	$4,426.55
Earthenware	Mather A.F.B.	1,260.00
Greeting Cards	Travis A.F.B.	2,733.70
Greeting Cards	McClellan A.F.B.	2,478.20
Earthenware	McClellan A.F.B.	630.00

5. Notwithstanding that the total value of the two shipments of Earthenware described in the preceding paragraph amounted to $1,890.00, the maximum recovery that plaintiff is entitled to for these two shipments is $570.43 because the two shipments of Earthenware were tendered to Westransco on a released rate valuation whereby recovery is limited to $20.00 per hundred pounds plus freight charges if paid.

6. The two shipments weighed 1,280 pounds and 640 pounds respectively and the freight charges paid by American Greetings to Westransco were $122.62 and $63.51 respectively.

APPENDIX 58

7. Section 2(a) of the terms and conditions of the Uniform

Domestic Straight Bill of Lading as published in the National Motor Freight Classification, a tariff in which both Westransco and ASSOCIATED FREIGHT LINES, INC., ("Associated") participated at the time the shipments at issue were tendered, provides in part:

> "In all cases not prohibited by law, where a lower value than actual value has been represented in writing by the shipper or has been agreed upon in writing as the released value of the property as determined by the classification or tariffs upon which the rate is based, such lower value plus freight charges if paid shall be the maximum amount to be recovered, whether or not such loss or damage occurs from negligence."

8. Because these shipments were not delivered the consignee has never paid the invoice amounts to American Greetings. American Greetings did not receive re-orders or otherwise make delivery of substitute merchandise to replace the commodities lost in these shipments.

9. Plaintiff, American Greetings, has no record of receiving the five letters referred to in answer to question 16 of plaintiff's initial interrogatories nor any explanation as to what happened to them. American Greetings did not file any written claim for any of the shipments until January 23, 1975, when claims were filed for the two shipments at issue which had been consigned to Mather Air Force Base. Claims were filed for the three remaining shipments on May 30, 1975.

10. On or about February 10, 1975, defendants, Westransco sent a letter to its agent, Freightways Express Inc., describing the accident and concluding: "Please inform American Greeting Corp. so that they might go ahead and file claim." This letter specifically refers to the two shipments on which claim had already been filed on

APPENDIX 59

January 23, 1975. Freightways Express Inc. sent a copy of this letter of February 10, 1975 to American Greetings Corporation.

James Idler

Sworn to before me this 5th day of April, 1976.

MAX RINGER Attorney At Law
NOTARY PUBLIC — STATE OF OHIO
My commission has no expiration date
Section 147.04 R. C.

APPENDIX 60

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
----------X

AMERICAN GREETINGS CORPORATION,

Plaintiff,

75 CIV. 5139 (CMM)

v.

WESTRANSCO FREIGHT COMPANY, INC.,
a/k/a WESTRANSCO FREIGHT COMPANY,
and ASSOCIATED FREIGHT LINES, INC.,

AMENDED COMPLAINT

Defendants.
----------X

Plaintiff, AMERICAN GREETINGS CORPORATION, by its attorneys, ARSHAM & KEENAN, for its amended complaint alleges:

FOR A FIRST CAUSE OF ACTION

1. Plaintiff, AMERICAN GREETINGS CORPORATION ("American Greetings") is a corporation organized and existing under the laws of the State of Ohio.

2. Defendant, WESTRANSCO FREIGHT COMPANY, INC., ("Westransco") is a corporation organized and existing under the laws of the State of California and is authorized to do business in the State of New York. Westransco operates in interstate commerce as a freight forwarder. Upon information and belief, Westransco maintains offices at 393 Seventh Avenue, New York, N.Y. and 661 West 34th Street, New York, N.Y.

3. Upon information and belief, defendant, ASSOCIATED FREIGHT LINES, INC., ("Associated") is a corporation organized and existing

APPENDIX 61

under the laws of the State of California and operates as a common carrier of property by motor vehicle in interstate commerce.

4. This action is brought under an Act of Congress regulating commerce, to wit, §§20(11), 219 and 413 of the Interstate Commerce Act, 49 U.S.C. §§20(11), 319 and 1013. Jurisdiction of this action is based upon 28 U.S.C. §1337.

5. The amount in controversy in this action exceeds the sum of $10,000.00 exclusive of interest and costs. Jurisdiction of this action is also based upon 28 U.S.C. §1331 and 1332.

6. Venue of this action is placed in the Southern District of New York pursuant to 28 U.S.C. §1391(c).

7. On or about March 14, 1974 American Greetings tendered to Westransco three shipments of greeting cards and two shipments of Earthenware for transportation from Osceola, Arkansas to various U.S. Air Force installations located in California. None of these shipments, identified in the following schedule, was delivered.

Commodity	No. of Cartons	Destination	Westransco Claim No.	Value
Greeting cards	28	Mather A.F.B.	506005	$4,426.55
Earthenware	40	Mather A.F.B.	506006	1,260.00
Greeting cards	18	Travis A.F.B.	506007	2,733.70
Greeting cards	23	McClellan A.F.B.	506008	2,478.20
Earthenware	20	McClellan A.F.B.	506009	630.00

APPENDIX 62

8. Notwithstanding that the full actual value of the two shipments of Earthenware set forth in the preceding paragraph was $1,260.00 and $630.00 respectively, these two shipments were tendered to Westransco on a released valuation which limited Westransco's liability to $20.00 per one hundred pounds plus freight charges if paid. The weight of these two shipments as set forth in the bills of lading was 1,280 pounds and 640 pounds respectively and the amounts of freight charges paid was $122.62 and $63.81, respectively. Therefore the total amount recoverable by plaintiff for these two shipments is limited to $570.43.

9. Upon information and belief, Westransco tendered these five shipments to Associated for transportation and all five shipments were totally destroyed while in the possession of Associated.

10. Upon information and belief, Westransco claims to have sent notice of the accident to the consignees and a copy of said notice to American Greetings by letters dated April 19, 1974.

11. Westransco is liable to American Greetings in the amount of $10,208.88 because of its failure to deliver these five shipments in good condition to the consignees.

12. Alternatively, if Westransco filed a claim in writing for the loss of these five shipments with Associated within nine months after a reasonable time for delivery, then American Greetings is entitled to recover $10,208.88 from Associated.

APPENDIX 63

13. All conditions precedent to the plaintiff's cause of action have been performed or have occurred.

FOR A SECOND, ALTERNATIVE CAUSE OF ACTION

14. Plaintiff repeats the allegations of Paragraphs number 1, 2, 6, 7, 9 and 13 as if specifically set forth herein.

15. This action is brought under an Act of Congress regulating commerce, to wit, §§406a(2) and 406a(6) of the Interstate Commerce Act, 49 U.S.C, §1006a(2) and §1006a(6). Jurisdiction of this action is based on 29 U.S.C. §1337 and upon the doctine of pendent jurisdiction.

16. American Greetings paid to Westransco for transportation of the five shipments at issue in this action the sum of $382.59.

17. Because Westransco did not deliver the five shipments at issue to the consignees it did not earn said freight charges.

FOR A THIRD, HYPOTHETICAL CAUSE OF ACTION

18. Plaintiff repeats the allegations of paragraphs number 1, 2, 3, 6, 7, 9, and 13, as if specifically set forth herein.

19. The Court may take jurisdiction of this action under the doctrine of pendent jurisdiction.

20. If Westransco or Associated salvaged any of the goods in the five shipments at issue, they converted the proceeds of salvage to their own use and failed to account to American Greetings.

WHEREFORE plaintiff, American Greetings Corporation, demands judgment against defendants, Westransco and Associated, in the amount of $10,208.88; or alternatively plaintiff demands judgment against Westransco in the amount of $382.59, and an accounting by Westransco and Associated of the proceeds of salvage, unless plaintiff recovers judgment under its First Cause of Action; together with interest, costs and disbursements in this action.

Dated: April 5, 1976

ARSHAM & KEENAN
Attorneys for Plaintiff
277 Park Avenue
New York, N.Y. 10017
(212) PLaza 9-1000

By Martin S. Snitow
Martin S. Snitow

APPENDIX 65

August 5, 1976 This motion is denied. See opinion filed in Companion motion

So ordered

/s/ Charles M. Metzner

U S DJ

APPENDIX 66

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

---------- X

AMERICAN GREETINGS CORPORATION,

Plaintiff,

-against-

WESTRANSCO FREIGHT COMPANY, INC.,

Defendant

Civil No. 75 Civ. 5139

Judge Metzner

---------- X

NOTICE OF MOTION

WESTRANSCO FREIGHT COMPANY, INC.

Third-Party Plaintiff,

-against-

ASSOCIATED FREIGHT LINES, INC.,

Third-Party Defendant.

---------- X

SIRS:

PLEASE TAKE NOTICE that upon the annexed affidavit of RALPH FRY, sworn to on the 11th day of May, 1976, and upon all the pleadings and proceedings had herein, and upon all the exhibits annexed hereto, the undersigned will move before HONORABLE CHARLES M. METZNER, United States District Judge, in Room 2201, of the United States District Courthouse, Foley Square, Borough of Manhattan, City of New York, on the 27th day of May, 1976, at 10:00 o'clock in the forenoon of that day, for an order, ~~pursuant to Rule 56~~ of

APPENDIX 67

the Federal Rules of Civil Procedure, granting summary judgment of indemnity to the defendant and third-party plaintiff, WESTRA SCO FREIGHT CO., INC., against the third-party defendant, ASSOCIATED FREIGHT LINES, INC., and providing such other and further relief as to the Court may seem just and proper.

Dated: May 17, 1976

Yours, etc.

TELL, CHESER, BREITBART & LEFKOWITZ
Attorneys for Defendant & Third-Party Plaintiff
116 John Street
New York, N.Y. 10038

TO:

ARSHAM & KEENAN, ESQS.
Attorneys for Plaintiff
277 Park Avenue
New York, N.Y. 10017

HILL, RIVKINS, CAREY, LOESBERG & O'BRIEN, ESQS.
Attorneys for Third-Party Defendant
96 Fulton Street
New York, N.Y. 10038

APPENDIX 68

75 Civil 5139

VERIFICATION

COUNTY OF

attorney admitted to practice
hereby certify, pur
that I have compared

found it to be a tr

19

signature

affirmed

that a

certified copy

named court

19

Hon.

named court at the

19

ERKOWITZ

Index No. Year 19

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

AMERICAN GREETINGS CORPORATION,

Plaintiff,

-against-

WESTRANSCO FREIGHT CO., INC.,

Defendant.

ETC.

ORIGINAL

NOTICE OF MOTION
& AFFIDAVIT

TELL, CHESER, BREITBART & LEFKOWITZ

Attorney(s) for Defendant & Third-Party Plaintiff

Office and Post Office Address

116 JOHN STREET
NEW YORK, N. Y. 10038
(212) 233-5100

To

Attorney(s) for

COPY RECEIVED

MAY 17 1976

TELL, CHESER, BREITBART, LESSING & GUREN

Appendix 69

BEST COPY AVAILABLE

ADMISSION OF SERVICE

The undersigned acknowledges receipt of a copy of the within

on 19

at o'clock M.

Attorney(s) for

by:

AFFIDAVIT OF SERVICE BY MAIL

STATE OF NEW YORK
COUNTY OF NEW YORK

Catherine Kopnicky, being sworn says: I am not a party to this action. I am over 18 years of age; I reside at Jamaica, N.Y.

On May 17, 1976 I served the within Notice of Motion & Affidavit upon Arsham & Keenan, Esqs.,

the attorney(s) for Plaintiff in this action, at

the address designated by said attorney(s) for that purpose by depositing a true copy of same enclosed in a postpaid, properly addressed wrapper, in an official depository under the exclusive care and custody of the United States Postal Service within the State of New York.

Type or Print Name Below Signature

Catherine Kopnicky

Sworn to before me

this 17th day of May 1976.

GEORGE T. GRIFFITH
Notary Public, State of New York

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

---------- X

AMERICAN GREETINGS CORPORATION,

Plaintiff,

-against-

WESTRANSCO FREIGHT COMPANY, INC.,

Defendant.

Index No. 75 Civ. 5139

---------- X

Judge Metzner

WESTRANSCO FREIGHT COMPANY, INC.,

Third-Party Plaintiff,

-against-

ASSOCIATED FREIGHT LINES, INC.,

Third-Party Defendant.

STATEMENT PURSUANT TO RULE 9(g) OF THE RULES OF THIS COURT

---------- X

STATE OF NEW YORK)
ss.:
COUNTY OF NEW YORK)

GEORGE T. GRIFFITH, being duly sworn, deposes and says:

I am an attorney duly admitted to practice in this Court and associated with TELL, CHESER, BREITBART & LEFKOWITZ, attorneys for the defendant and third-party plaintiff in the above entitled action.

APPENDIX 70

Pursuant to the provisions of Rule 9(g) of the Rules of this Court, I hereby state the following:

By this action plaintiff seeks recovery of $11,528.49, the alleged value of five shipments of merchandise which defendant and third-party plaintiff, WESTRANSCO FREIGHT CO., INC. (hereinafter "Westransco"), a freight forwarder, received from plaintiff in Osceola, Arkansas, for transportation and delivery to various consignees in California in March of 1974. Westransco turned these shipments over to the third-party defendant, ASSOCIATED FREIGHT LINES, INC. (hereinafter "Associated"), a common motor carrier, for completion of the transportation and delivery to the consignees. The shipments were then intact. Westransco was later informed by Associated that the latter's vehicle into which the shipments had been loaded was involved in an accident on the San Francisco - Oakland Bay Bridge, as a result of which they were damaged beyond salvage and were never delivered.

The occurrence took place on March 27, 1974. There was in force and effect on that date an agreement between Westransco and Associated; a copy thereof is annexed hereto as Exhibit A.

Paragraph 4 thereof, headed "Description of Service", states that the services encompassed by the agreement "include (1) line haul transportation by motor carrier of a shipment or shipments moving in the service of the forwarder ... (b) from a forwarder station or an interchange point to or toward

the ultimate destination ...". Thus, when the five shipments herein were destroyed during transportation by Associated from Westransco's San Francisco terminal to the ultimate consignees, Associated was engaged in the performance of its contract with Westransco.

The Court will also note that such agreement provides in pertinent part that Associated (as motor carrier) shall indemnify Westransco (as freight forwarder) if the latter is found liable by reason of any loss or damage occurring while Associated was performing its contractual duties.

It necessarily follows from the foregoing that in the event Westransco is found liable to plaintiff in this action, that Associated will be liable to Westransco in a like amount, together with the costs and disbursements of this action, and that defendant and third-party plaintiff's motion should be granted accordingly.

George T. Griffith

George T. Griffith

Sworn to before me this

17th day of May, 1976

Abraham Breitbart

ABRAHAM BREITBART
NOTARY PUBLIC, STATE OF NEW YORK
No 60-54-5[illegible]
Qualified in Westchester County
Commission expires March 30, 19[illegible]

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0924-PWF

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------x

AMERICAN GREETINGS CORPORATION,

Plaintiff,

v.

WESTRANSCO FREIGHT COMPANY, INC.

Defendant.

75 Civ. 5139

Judge Metzner

----------x

WESTRANSCO FREIGHT COMPANY, INC.

Third-Party Plaintiff,

v.

ASSOCIATED FREIGHT LINES, INC.,

Third-Party Defendant.

ANSWERS TO INTERROGATORIES

----------x

The third-party defendant, Associated Freight Lines, Inc., [hereinafter Associated], through their attorneys Hill, Rivkins, Carey, Loesberg & O'Brien, for their Answers to Interrogatories propounded by the plaintiff, allege as follows:

1. Q. Did WESTRANSCO FREIGHT COMPANY, INC. ("Westransco") or ASSOCIATED FREIGHT LINES, INC. ("Associated") salvage any of the cargo which was being transported in the same vehicle as the shipments at issue in this action after it was involved in an accident?

A. No.

2. Q. If so, state which company salvaged the material and the name and address of the ~~person or~~ persons performing the salvage.

A. Not applicable.

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3. Q. State whether any of the cargo was sold as salvage, and if sold before or after repair.

A. Yes, before repair.

4. Q. State whether Associated received any amount as proceeds of salvage from any person.

A. Yes.

5. Q. State whether Associated transmitted to Westransco any of the proceeds of salvage.

A. No.

6. Q. If Westransco or Associated retained any of the proceeds of salvage, state the total amount retained and by whom.

A. $1,500.00.

7. Q. Was the cargo in the shipments at issue in this action salvaged? If so, state by whom the material was salvaged and the amount of the proceeds from salvage.

A. No. This particular merchandise was completely destroyed.

8. Q. If the cargo in the shipments at issue was salvaged, describe the method of salvage, and the method by which the salvage was sold.

A. Not applicable.

9. Q. Has either Associated or Westransco retained the proceeds of the salvage of the shipments at issue in this action?

A. No.

10. Q. If the cargo in the shipments at issue was not salvaged or if any other cargo transported on the same truck was not salvaged, describe what was done with that cargo, by whom it was done, when it was done and the reason for this disposition.

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A. These cargo claims arose as a result of a vehicle crash involving third-party defendant's truck when it skidded on the rain-wet lower deck of the San Francisco-Oakland Bay Bridge. The collision between this truck and the super structure of the bridge was of such violence that it caused the cargo-carrying body of the vehicle to break in two, spilling most of its contents onto the heavily traveled roadway. Some of the merchandise was taken by passing motorists who apparently stopped to help, if not the driver, at least themselves. The balance of the distressed merchandise was a definite hazard to traffic and so was therefore scooped from the driving surface with the use of Highway Department owned power shovels and poured into two waiting dump trucks. The force of the collision, coupled with the inclement weather and the unceremonious cleanup operation, caused those goods which once might have produced some salvage value to become a kind of sodden puree.

Dated: New York, New York
May 18, 1976

HILL, RIVKINS, CAREY, LOESBERG & O'BRIEN
Attorneys for Third-Party Defendant
Associated Freight Lines, Inc.

By _____
Attorney of Record

96 Fulton Street
New York, New York 10038
Telephone: (212) 233-6171

TO: ARSHAM & KEENAN
Attorneys for Plaintiff
277 Park Avenue
New York, N.Y. 10017

TELL, CHESER, BREITBART
& LEFKOWITZ
Attorneys for Defendant
Westransco Freight Company, Inc.
116 John Street
New York, New York 10038

APPENDIX 75

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------X

AMERICAN GREETINGS CORPORATION,

Plaintiff,

-against-

WESTRANSCO FREIGHT COMPANY, INC.,

Defendant.

75 Civ. 5139

Judge Metzner

AFFIDAVIT

----------X

WESTRANSCO FREIGHT COMPANY, INC.,

Third-Party Plaintiff,

-against-

ASSOCIATED FREIGHT LINES, INC.,

Third-Party Defendant.

----------X

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

GEORGE T. GRIFFITH, being duly sworn, deposes and says:

I am an attorney at law admitted to practice in this Court and associated with TELL, CHESER, BREITBART & LEFKOWITZ,

APPENDIX 76

attorneys for the defendant, WESTRANSCO FREIGHT COMPANY (hereinafter Westransco) in the above entitled action. I am familiar with the facts and circumstances of this case and make this affidavit in support of defendant's motion for summary judgment and in opposition to plaintiff's cross-motion for summary judgment wherein plaintiff seeks leave to serve an amended complaint if its motion for summary judgment is denied.

The burden of plaintiff's proposed amended complaint is to attempt to usurp for itself any written claim which may have been filed by the defendant against the third party defendant, Associated Freight Lines, Inc. (hereinafter Associated). Plaintiff offers no proof in support of such allegation and after investigation I am able to state to this Court that Westransco never filed a written claim with Associated for the loss of the five shipments which are the subject matter of this suit. To permit such amendment would be an exercise in futility.

Plaintiff's proposed second cause of action seeks a refund of the amount of the freight charges paid to the defendant. This is eminently reasonable and if defendant's motion for summary judgment is granted, defendant will return to the plaintiff the freight charges amounting to $382.59.

The third proposed cause of action seeks recovery of alleged salvage proceeds. Again, there is no proof submitted by plaintiff that any such salvage proceeds were recovered. And again I can assure the Court that Westransco did not receive the salvage or any salvage proceeds.

In view of the foregoing, there is no necessity for an amended complaint. It is accordingly requested that defendant's motion for summary judgment be granted, and that plaintiff's cross motion for summary judgment be denied.

George T. Griffith

GEORGE T. GRIFFITH

Sworn to before me this

24th day of May, 1976

Seymour Lefkowitz

SEYMOUR LEFKOWITZ
Notary Public, State of New York
No. 30-2297050 Qual. in Nassau County
Commission Expires March 30, 1977

APPENDIX 78

10924-PWF

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- - - - - - - - - - - - - - - - - - -x

AMERICAN GREETINGS CORPORATION, :

Plaintiff, :Index No. 75 Civ. 5139
Judge Metzner

v. :

WESTRANSCO FREIGHT COMPANY, INC.,:

Defendant, :

v. :

ASSOCIATED FREIGHT LINES, INC:, :AFFIDAVIT IN OPPOSITION

Third-Party Defendant. :

- - - - - - - - - - - - - - - - - - -x

Peter W. Flanagan, being duly sworn, deposes and says:

That he is an attorney admitted to practice in all the Courts of the State of New York and is associated with Hill, Rivkins, Carey, Loesberg & O'Brien, attorneys for the third-party defendant, ASSOCIATED FREIGHT LINES, INC., [hereinafter ASSOCIATED].

That he is fully familiar with all the proceedings which have occurred thus far since the inception of the third-party action against ASSOCIATED.

That this affidavit is submitted in opposition to the plaintiff's motion for summary judgment and in support of the defendant Westranco's motion for summary judgment dismissing plaintiff's complaint.

The plaintiff's motion for summary judgment is premature. The plaintiff in its memorandum of law in support of its motion [p. 9] correctly relys on Missouri Pacific R.R. Co. v. Elmore & Stahl, 377 U.S. 134, as authority for what its prima facie case should be.

APPENDIX 79

> Accordingly, under Federal Law, in an action to recover from a carrier for damage to a shipment, the shipper establishes his prima facie case when he shows delivery in good condition, arrival in damaged condition and the amount of damages.

Nowhere, in any of the papers before this Court in support of the plaintiff's motion, nor through any mode of disclosure, has evidence of the good condition of the shipment to the carrier been established. Clearly, however, this is part of plaintiff's burden under Missouri Pacific, etcl, cited above.

Third-party defendant's interrogatory #30 (a) propounded to the plaintiff and served upon the plaintiff's attorneys on January 28, 1976, specifically requested information concerning the condition of the shipments when delivered to the carrier:

> State what evidence the plaintiff will offer at the time of trial to establish the condition of the shipments at the time it was given to the defendants, Westransco and ASSOCIATED.

This interrogatory, along with the previous twenty-nine, remain unanswered.

For this reason, there exists a question of fact vital to plaintiff's case and, therefore, plaintiff's motion should be denied.

In Opposition to Defendant's Motion for Indemnity against Third-Party Defendant, ASSOCIATED

APPENDIX 80

The defendant, Westransco, was the "initiating

the shipments originated in Arkansas and were carried by rail to California prior to their receipt by the third-party defendant, ASSOCIATED. There is presently no evidence as to the condition of the shipments when delivered to ASSOCIATED. Thus, the defendant, Westransco's motion for indemnity by ASSOCIATED for any amount for which Westransco might be found liable to the plaintiff is premature. Such a request by the defendant, Westransco, assumes that the shipments in question were received in good condition and that, therefore, they were of full value when received. There is no evidence in the record or before the Court to support such a conclusion.

Peter W. Flanagan

Sworn to before me this
26th day of May, 1976.

LOUIS N. GIANGARRA
Notary Public, State of New York
No. 24-4525960 Qual. in Kings County
Cert. Filed in New York County
Commission Expires March 30, 1978

Notary Public

TO: Tell, Cheser, Breitbart
& Lefkowitz
Attorneys for the Third-Party Plaintiff &
Defendant, Westransco
111 John Street
New York, New York 10038

Arsham & Keenan
Attorneys for Plaintiff
277 Park Avenue
New York, New York 10017

APPENDIX 81

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
----------X

AMERICAN GREETINGS CORPORATION,

Plaintiff,

75 Civil 5139 (CMM)

v.

AFFIDAVIT

WESTRANSCO FREIGHT COMPANY, INC.,

Defendant,

v.

ASSOCIATED FREIGHT LINES, INC.,

Third-Party Defendant.
----------X

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

MARTIN S. SNITOW being duly sworn, deposes and says:

1. I am an attorney associated with ARSHAM & KEENAN, attorneys for plaintiff in this action. I am a member of the Bar of this Court and I am fully familiar with the facts at issue herein. I make this affidavit in reply to the affidavit in opposition submitted by Peter W. Flanagan, Esq., attorney for Third-party defendant.

2. Mr. Flanagan's affidavit questions the sufficiency of evidence showing that the five shipments at issue were tendered to defendant by plaintiff in good condition.

3. In support of its motion for summary judgment, plaintiff filed the affidavit of Mr. James Edler to which were annexed the answers to interrogatories filed by defendant. Defendant attached

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to its answers to interrogatories copies of the bills of lading for the five shipments at issue.

4. The said bills of lading incorporated by reference the terms and conditions of the Uniform Domestic Straight Bill of Lading as admitted by defendant in answer to question 5 of said interrogatories.

5. The said five bills of lading contained the following recitation, which is also part of the Uniform Domestic Straight Bill of Lading as published in the National Motor Freight Classification, a tariff which defendant admitted in answer to question 3 of the answers to interrogatories governed the shipments at issue:

> "Received, subject to the classifications and tariffs in effect on the date of the issue of the bill of lading, the property described below, in apparent good order, except as noted (contents and condition of contents of packages unknown) . . ."

6. Although the print in the copies of the bills of lading annexed to defendant's answers to interrogatories is almost illegible, the same wording or virtually the same wording appears thereon.

7. This recitation is prima facie evidence that the goods were delivered to the carrier in the quantity and quality described and that the goods were in apparent good order so far as could be determined from external inspection. Tuschman v. Pennsylvania R.R. Co., 230 F. 2d 787, 791 (3 Cir., 1956).

8. The five shipments were not merely damaged; they were completely destroyed in the course of transportation. Plaintiff submits

that when a consignment is received by a common carrier in external good order and delivered by it with the external covering of the goods so damaged as to account for the damage to the contents, the owner need not prove the internal good order of the goods at the time of receipt by the carrier, and the presumptive liability of the carrier is established. Reider v. Thompson 197 F. 2d 158, 161 (5 Cir., 1952); see also 116 F. Supp. 279 (E.D. La., 1953). Where the cause of the loss is evident, as here, there is a rebuttable presumption that the cargo was in good condition when tendered to the carrier. Time-DC Inc. v. S.W. Historical Wax Museum 528 S.W. 2d 901, 903 (Tex. Ct. Civ. App., 1975). Even if the carrier rebuts this presumption it is still liab for the additional damage it caused. The condition of the goods at origin is only relevant to the question of damages and not liability. Kingsley Sportswear, Inc. v. Standard Hauling Co., Inc., 49 AD 2d 854, 855, 374 NYS 2d 19, 20 (1st Dept., 1975). If the Court finds there is a genuine issue about the condition of the goods at origin, it may render a summary judgment on the issue of liability pursuant to Rule 56(c) of the Federal Rules of Civil Procedure.

9. Mr. Flanagan's affidavit refers to a failure by plaintiff to respond to his interrogatories. Perhaps Mr. Flanagan has forgotten that he agreed to review a transcript of an oral deposition of plaintiff's witness Mr. Edler and the exhibits presented at that time. He further agreed that after reviewing this material he would notify me whether he required answers to any of the interogatories he had propounded. A copy of my letter dated January 29, 1976 to Mr. Flanagan

concerning this agreement is annexed to this affidavit. Mr. Flanagan never advised me subsequently that he required any further information or discovery.

For the foregoing reasons plaintiff has established all of the elements of its prima facie case and is now entitled to summary judgment.

Martin S. Sirotow

Sworn to before me this
27th day of May, 1976

Anne M. Gray

ANNE M. GRAY
Notary Public, State of New York
Qual. in Bronx Co. No. 03-6631350
Commission Expires March 30, 1978

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January 29, 1976

Peter W. Flanagan, Esq.
Hill, Rivkins, Carey, Loesberg & O'Brien, Esqs.
96 Fulton Street
New York, N.Y. 10038

Re: American Greetings v. Westransco
v. Associated Freight

Dear Mr. Flanagan:

Enclosed per our telephone conversation today are copies of defendant's exhibits A through N, marked at the oral deposition of Mr. James Edlar held on December 24, 1975. I understand you will obtain a copy of the transcript of that deposition and a copy of Westransco's pleadings from its attorney, Mr. Kirschenbaum.

As we agreed, I will not attempt to obtain Answers to the Interrogatories you propounded until you have reviewed the transcript and exhibits and have advised me what additional information you require.

Thank you for your cooperation.

Sincerely yours,

Martin S. Snitow

MSS:amg
cc: I. J. Kirschenbaum, Esq.
228-3

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- - - -

On March 14, 1974, plaintiff tendered to defendant three shipments of greeting cards and two shipments of earthenware for transportation from Arkansas to California. On March 24, 1974, the goods were totally destroyed in an accident involving the third-party defendant's truck which was to make the deliveries on behalf of the defendant.

Defendant asserts that plaintiff is barred from recovery because of its failure to file written claims within the nine-month period required by Section 2(b) of the Uniform Bill of Lading. Claims were filed on January 23, 1975 for two shipments, and on May 30, 1975 for the remaining three.

The law is settled that the filing of a written claim within the time limit prescribed by the bill of lading is a condition precedent to recovery. B. A. Waterman Company v. Pennsylvania Railroad Company, 295 F.2d 627 (6th Cir. 1961); East Texas Motor Freight Lines v. United States, 239 F.2d 417 (5th Cir. 1956). Plaintiff's reliance on Hopper Paper Co. v. Baltimore & Ohio R.R., 178 F.2d 179 (6th Cir. 1949), cert. denied, 339 U.S. 943 (1950), which held that in the case where the carrier had actual knowledge of the damage, a failure to file a timely claim would be excused is misplaced. Other federal courts have rejected its holding and held that the carrier's

knowledge of damage is immaterial to the requirement of a written notice of claim. East Texas Motor Freight Lines v. United States, supra; Northern Pacific Ry. v. Mickle, 195 F.2d 641 (9th Cir. 1952); Insurance Company of North America v. Newtonne Mfg. Co., 187 F.2d 675 (1st Cir. 1951). In Delphi Frosted Foods Corp. v. Illinois Central R.R., 188 F.2d 343 (6th Cir.), cert. denied, 342 U.S. 883 (1951), the Sixth Circuit limited Hopper to its "peculiar facts," which included the carrier's selling the salvage without plaintiff's knowledge and without accounting to the plaintiff for the proceeds.

Despite the occasional harshness of the result, the Supreme Court has required strict adherence to the terms of a bill of lading issued pursuant to the Interstate Commerce Act. It has held that to allow waivers of conditions in the bill of lading would be "to open the door for evasions of the spirit and purpose of the act to prevent preferences and discrimination in respect of rates and service." Chesapeake & Ohio Ry. v. Martin, 283 U.S. 209 (1931).

The requirement of the filing of a written claim remains the law. It may be informal, but it must indicate an intention to claim damages. American Synthetic Rubber Corp. v. Louisville & Nashville R.R., 422 F.2d 462 (6th Cir. 1970). As plaintiff concedes,

no writing exists here other than defendant's notice to plaintiff of the loss dated April 19, 1974. This does not suffice. Defendant's motion for summary judgment is granted. Plaintiff's motion for summary judgment is denied.

Plaintiff moves alternatively for leave to file an amended complaint asserting a hypothetical cause of action against defendant for the proceeds of any claim it may have filed against the third-party defendant and for the proceeds of any salvage recovered either by defendant or the third-party defendant. Plaintiff would also seek to recover a $282.59 refund of freight charges paid to defendant.

In its responding papers defendant agrees to refund the freight charges and is hereby ordered to do so. While hypothetical pleadings are allowed by Rule 8(e), Fed. R. Civ. P., plaintiff presents no information upon which it bases these hypothetical claims. Defendant's attorney has submitted an affidavit which states that no claim was ever filed by defendant against third-party defendant and that defendant received no salvage proceeds. Answers to interrogatories filed by third-party defendant after the instant motion was made state that no salvage was ever received because the cargo was a total loss. Plaintiff has not controverted in any way this material.

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To allow the filing of the amended complaint under these circumstances would appear to be an exercise in futility.

The motion to file an amended complaint is denied.

So ordered.

Dated: New York, N. Y.
August 5, 1976

CHARLES M. METZNER
U. S. D. J.

APPENDX 91

Copy Rec'd 8/23/76

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

AMERICAN GREETINGS CORPORATION, Plaintiff,	:	75 Civ. 5139 (CMM)
v.	:	
WESTRANSCO FREIGHT COMPANY, INC., Defendant.	:	NOTICE OF APPEAL
WESTRANSCO FREIGHT COMPANY, INC. Third-Party Plaintiff,	:	
v.	:	
ASSOCIATED FREIGHT LINES, INC., Third-Party Defendant.	:	

Notice is hereby given that AMERICAN GREETINGS CORPORATION, plaintiff above named, hereby appeals to the United States Court of Appeals for the Second Circuit from the final judgment entered in this action on the 5th day of August, 1976.

Dated: New York, N.Y.
August 23, 1976

ARSHAM & KEENAN
Attorneys for Plaintiff
277 Park Avenue
New York, N.Y. 10017
(212) PLaza 9-1000

By Martin S. Snitow
Martin S. Snitow

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#44828

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

---------- X

AMERICAN GREETINGS CORPORATION,

Plaintiff,

-against-

WESTRANSCO FREIGHT COMPANY, INC.,

Defendant.

---------- X

WESTRANSCO FREIGHT COMPANY, INC.,

Third-Party Plaintiff,

-against-

ASSOCIATED FREIGHT LINES, INC.,

Third-Party Defendant.

----------X

S. District Court
Filed
Aug 23 1976
S.D. of N.Y.

Index No. 75 Civil 5139

JUDGMENT

#76,784

A motion having been made by the defendant above named, WESTRANSCO FREIGHT COMPANY, INC., for an order granting summary judgment in favor of the defendant and against the plaintiff, pursuant to Rule 56 of the Federal Rules of Civil Procedure, on the ground that there is no genuine issue as to any material fact, and that defendant is entitled to judgment as a matter of law, and a cross-motion having been made by plaintiff for summary judgment

Microfilm August 26, 1976

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in the amount of $10,208.88, and, alternatively, for leave to amend its complaint, and the said motions having been duly heard by Honorable Charles H. Metzner, District Judge, and decision on the said motions having been duly rendered, it is

ORDERED AND ADJUDGED that plaintiff's motion is hereby denied in all respects; and it is further

ORDERED AND ADJUDGED that defendant's motion for summary judgment is hereby granted in all respects, and plaintiff's complaint against the defendant is hereby dismissed on the merits, with costs as taxed in the amount of $26.88 in favor of the defendant and against the plaintiff, and that defendant have execution therefor; and it is

ORDERED that defendant is directed to pay to plaintiff the sum of $382.59, being a refund of freight charges defendant heretofore received from plaintiff; and it is further

ORDERED, that defendant's third-party complaint against the third-party defendant, ASSOCIATED FREIGHT LINES, INC., is hereby dismissed.

Dated: August 22 1976

/s/ Charles Metzner
U.S.D.J.

Sma

Judgment Entered 8/25/76
/s/ Raymond F. Burghardt

APPENDX 94

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

AMERICAN GREETINGS CORPORATION,
Plaintiff

v.

WESTRANSCO FREIGHT COMPANY, INC.
Defendant & Third Party Plaintiff,

v.

ASSOCIATED FREIGHT LINES, INC.
Third Party Defendant.

CASE NO. 75 Civ. 5139 (CHM)

JUDGE Metzner

CLERK'S CERTIFICATE.

I, RAYMOND F. BURGHARDT, Clerk of the District Court of the United States for the Southern District of New York, do hereby certify that the certified copy of docket entries lettered A- C, and the original filed papers numbered 1 thru 32, and exhibits _____, inclusive, constitute the record on appeal in the above entitled proceeding; except for the following missing documents:

DATE FILED _____ DESCRIPTION _____

IN TESTIMONY WHEREOF, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, this 20th day of August, in the year of our Lord, One thousand nine hundred and seventy six, and of the independence of the United States the 201st year.

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Raymond F. Burghardt
Clerk of the Court.